304 Ill. App.
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

304 I.A. 25

All abstract
Opinions
for volume
304 Ill App
missing except a few
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GEN. NO. 9491 AGENDA NO. 19.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1939.

IN THE MATTER OF THE ESTATE OF CHARLES W. SMITH, DECEASED.

HARRIET E. LEVINGS, CLAIMANT-APPELLEE,

vs.

FRANC INGRAHAM, Administratrix de bonis non of the Estate of Charles W. Smith, Deceased, With the Will Annexed, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF LEE COUNTY.

WOLFE, P. J.

The appellee, Harriet E. Levings, filed a claim against the Estate of her father, C. W. Smith, in the County Court of Lee County. The claim was on a note dated March 7, 1925, for the principal sum of $5,000.00 with interest to March 7, 1937, amounting in all to the sum of $12,749.56. A copy of the note was attached to the claim of which one paragraph is as follows: "It is hereby stipulated that this note is not received in satisfaction of the indebtedness for which it is given, but as collateral security to the original indebtedness; and it is agreed that the payee does not, by receiving this note, relinquish any rights or remedies which he may have on the original debt." The last paragraph of the note is what is commonly termed a judgment note.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1939.

IN THE MATTER OF THE ESTATE OF CHARLES W. SMITH, DECEASED.

HARRIET S. LEVINGS, CLAIMANT-APPELLEE,

vs.

MAUD SMITH, Administratrix de bonis non of the Estate of Charles W. Smith, Deceased, with the Will Annexed, Defendant-Appellant.

APPEAL FROM COUNTY COURT OF LEE COUNTY.

WHERE, P. 7.

The appellee, Harriet S. Levings, filed a claim against the Estate of her father, C. W. Smith, in the County Court of Lee County. The claim was on a note dated March 7, 1925, for the principal sum of $5,000.00 with interest to March 7, 1937, amounting in all to the sum of $12,749.56. A copy of the note was attached to the claim of which one paragraph is as follows: "It is hereby stipulated that this note is not received in satisfaction of the indebtedness for which it is given, but as additional security to the original indebtedness; and it is agreed that the payee does not, by receiving this note, relinquish any rights or remedies which he may have on the original debt." The last paragraph of the note is what is commonly termed a judgment note.

The case was tried before the County Court and the claim was disallowed. The claimant took an appeal to the Circuit Court and the case was tried before a jury who rendered a verdict for $5,000.00, in favor of the claimant. On motion of the defendant, a new trial was granted. The case was again tried before a jury, who found the issues in favor of the plaintiff, for $5,000.00. The defendant entered a motion for a new trial, for judgment notwithstanding the verdict, and in arrest of judgment. All these motions were overruled, and judgment entered on the verdict in favor of the plaintiff for $5,000.00. It is from this judgment that the appeal is prosecuted.

Mr. Robert L. Bracken, one of the attorneys for the claimant, testified that he had computed the interest on the note in question, and at the time of the hearing the total amount due, including principal and interest, was $15,016.95. The note was then offered in evidence. The abstract shows the following--"Mr. Smith: We object to the offering of the endorsements on the note, because there has been no proof in respect to that. I have no objection to the introduction of the note, but do object to the endorsements on the back." After some discussion between the attorneys, the note was then admitted in evidence, and the plaintiff rested her case.

The defendant then introduced some documentary evidence which showed that C. W. Smith, several years prior to his death, had been adjudged a bankrupt, and had been discharged as such. He also introduced in evidence the probate records of the Last Will and Testament of Charles W. Smith, in the County Court of Lee County. These records show that the County Court admitted the will to probate and Mr. J. W. Glendenin was appointed Executor of the Will.

These files also show that Harriet S. Levings filed objections to certain proceedings in said probate matter and alleged that Charles W. Smith, for several years, was insane. This was all the evidence offered on behalf of the defendant.

The plaintiff then introduced the evidence of Mr. J. L. Smith of Shell Lake Wisconsin, who testified that he knew C. W. Smith in his lifetime, and also his daughter, Harriet S. Levings; that he prepared the note in question, and at the direction of C. W. Smith; that Mr. Smith told him that he was indebted to his daughter, Harriet, in a sum in excess of $5,000.00, and that he wanted to give her something to show for it; that he, J. L. Smith, then prepared the note and Mr. Charles W. Smith signed it.

Lois Critser testified that she was a sister of Harriet S. Levings, and a daughter of C. W. Smith; that her father had died on the 9th of May 1937; that she had, within a year previous to her father's death, had a conversation with him with reference to the note of her sister, Harriet, and her father said that the note would have to be paid and that, "I would pay it as soon as I can and as fast as I can;" that at another time said that he intended to pay the note and to pay it as fast as he could. She further testified that her sister, Harriet S. Levings, was thirty-six years old.

Emma Powell testified that she had known C. W. Smith since 1902; that the Smith's took her to rear when she was a little girl; that she knew Harriet Smith Levings and Mrs. Critser; that during Mr. Smith's lifetime she heard a conversation between his daughter, Harriet S. Levings, and Mr. Smith with reference to whether or not he owed money to Mrs. Levings; that the conversation happened at the dinner table about two years before he died; that he

told Mrs. Levings that if she tried to get the $5,000.00 note, it with interest, would clean him out, and she said, "I would not do that," and he said, "Then I will pay it when I can as I can."

Lois Critser was recalled as a witness and testified that in October 1933, that she recalled when some pigs were sold and delivered by C. W. Smith, to Harriet Smith Levings; that she went with her father to take the pigs and delivered them to her sister; that at the time the pigs were delivered, she saw the endorsement made on the back of the note, which is "Plaintiff's Exhibit No. 1," and which read as follows: "October 6, 1933, by five pigs, $25.00." That the endorsement was made at the time the pigs were delivered.

Anna Powell was recalled as a witness and testified that she was at the home of C. W. Smith on the 9th day of July 1935, and was present when Harriet Levings wrote on the back of the note in question, "(Plaintiff's Exhibit No. 1,)" the following: "July 5, 1935, cash $10.00;" that Mr. C. W. Smith was present at that time; that Mrs. Levings was down there and was getting ready to go home, and her father gave her $10.00 and told her "Just put that on the note," and she saw Mrs. Levings write the endorsement on the note. This was all the evidence introduced at the time of the trial.

It is first insisted that the evidence does not sustain the verdict, and therefore the court erred in not granting the plaintiff a new trial. The plaintiff's evidence is not contradicted in any manner, and clearly shows that Charles W. Smith acknowledged that he was indebted to the claimant in the sum in excess

of $5,000.00; that he wanted to give his daughter something to show for it, and at his direction, the note in question was prepared, and that he signed it and later delivered the note to Mrs. Levings. It is also uncontradicted that the two payments endorsed on the back of the note were actually paid, and endorsed there at the time the payments were made. It is also uncontradicted that the father acknowledged that he owed this debt after he had gone through bankruptcy, and that he intended to pay it. It is our conclusion that the evidence fully sustains the contention of the claimant.

It is next insisted that the note on its face shows that it is outlawed, we cannot agree with this contention. As above stated, the evidence shows that there were payments made on the note before the Statute of Limitation applied, and therefore the note was a valid and existing obligation at the time of the death of Charles W. Smith, and at the time the same was filed as a claim against his estate. Wright vs. Stinger 269 App. 124; Willett vs. Maxwell 169 Ill. 540.

It is insisted by the appellants that since Charles W. Smith took advantage of the bankrupt law, and was discharged as a bankrupt, that the debt was extinguished, and therefore the claimant could not recover in this case. The usual rule of law is that when a person goes through bankruptcy, that all claims or indebtedness that he lists as being claims against his bankrupt estate are extinguished by operation of law. This, however, does not relieve the bankrupt from the moral obligation of paying his just debts. It seems to us that it is nothing unusual for a father who owes his daughter considerable money, to recognize his moral obligation to pay the same. The evidence in this case

shows that Charles W. Smith did recognize this moral obligation to pay this debt, and stated several times that he would pay Harriet what he owed her when and as soon as he could. This was a legal recognition of the debt, after he had been discharged in bankruptcy. Wright vs. Stinger 269 App. 224; St. John vs. Stephenson 90 Ill. 82. Stern vs. Smith and Company 225 Ill. 430.

The appellant urges that the appellee ought not to recover in this case because he introduced in evidence an affidavit which was filed by Mrs. Levings in the County Court of Lee County concerning her father's will in which she stated that her father was insane and had been insane for several years; that this is conclusive proof that the father was insane and therefore unable to legally transact the business, which she claims he did. If this should be taken as any evidence tending to show the insanity of Charles W. Smith, the defendant has overcome that evidence by the exhibits offered by him, and introduced in evidence, namely, the files of the probate court relative to the will of Charles W. Smith, deceased. The attesting witnesses to the will certify at the time that Charles W. Smith signed the will that he was of sound mind and memory, and no doubt the probate judge, before issuing letters of administration, found the testator to be of sound mind and memory. It seems to us this is a matter that is not an issue in this case.

The appellant does not contend that it is the usual rule that a pre-existent debt is a valid consideration for a promissory note, but insists that the claimant cannot recover upon this note in question.

From the record in this case we find; that there was a valid consideration for the note; that the same was acknowledged by Charles W. Smith, to be an indebtedness of his after he had been discharged in bankruptcy, and that he agreed to pay his daughter the amount of this note; that the payments endorsed on the back of the note were actually paid by Charles W. Smith, during his lifetime, and the same was credited upon the note. We therefore hold that the judgment of the trial court is correct and the same is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9497 AGENDA NO. 25.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1939.

WILLIAM V. DUTNER,
Plaintiff-Appellant,

vs.

JOHN H. MATHES,
Defendant-Appellee.

Appeal from
Circuit Court,
Peoria County.

WOLFE, P. J.

This suit is for damages for injuries received by the plaintiff while riding as a guest in the automobile of the defendant, who drove it off the pavement of a public highway near South St. Paul, Minnesota, on September 1, 1935, causing the car to overturn. In general terms the complaint charges that the defendant operated the automobile in a negligent manner; that he violated the Statute of the State of Minnesota governing the speed of automobiles driven on its public highways. The defendant amended his answer denying the charges of the complaint by alleging, in substance, that the plaintiff, having brought his suit in a court of Illinois, is bound to prove that the defendant was guilty of wilful and wanton misconduct in driving his car at the time of the accident. (Section 58--Motor Vehicle Law.) On motion of the plaintiff, the amendment was stricken. No issue was made on the necessity of the proof showing wilful and wanton misconduct by the defendant. There is nothing in the record indicating that the testimony was received for any reason other than as tending to prove, or disprove the charges of negligence in the complaint.

Unless there is merit to the argument of the plaintiff in support of his objection to instruction number one, given for the defendant; the trial was along the line, that if the jury should find, from the evidence, that the defendant was guilty of any charge of negligence, and the plaintiff free of contributory negligence, their verdict should be for the plaintiff.

Instruction number 1, is as follows: "In submitting this case to you for consideration, the jury must not regard such act of the Court in so submitting such case to you for your consideration and determination, as any indication as to which way the Court thinks this case should be decided. The submission of this case by the Court to the jury should not be considered by you as any indication on the part of the Court as to what your verdict should be. The Court expresses no opinion as to what the verdict of the jury should be. It is your duty in this case to decide the same upon the evidence produced upon the trial and under the law as it now exists in this state, and is defined to you by the instructions given to you by the Court, and this you should do without any regard to your own personal ideas as to what the law ought to be. The instructions read to you by the Court must be accepted by the jury as the law governing this case, and it is your duty to read these instructions before you arrive at a verdict."

It is argued that the instruction misled and confused the jury and created the impression in the minds of the jurors that the provision of our Motor Vehicle Law requiring proof by the plaintiff of wilful and wanton misconduct by the defendant was applicable to the case. To be convincing, this argument must assume that the jurors knew the provision and that it was in force; that the jury disregarded instructions informing them that the law applicable to the evidence, was stated in the instructions; and,

also, that the court failed, from neglect or lack of knowledge, to instruct on the correct rule of law to be applied to the evidence under the issues made and confined by the pleadings.

Plaintiff offered, and there was given on his behalf, one instruction, which is on the question of damages. For the defendant 22 instructions were given, and, except number 1, they are similar to instructions given in a suit where the issue is, whether the defendant was in the exercise of ordinary care. No instruction was given that the plaintiff was required to prove the defendant guilty of wilful misconduct. The jury found the defendant not guilty. A motion for a new trial, on the ground that the jury was confused and misled by instruction number 1, was denied.

Parts of instruction number one, are as follows: "It is your duty in this case to decide the same upon the evidence produced upon the trial, and under the law as it now exists in this State, <u>and is defined to you by the instructions given to you by the Court</u>." "The instructions read to you by the Court must be accepted by the jury as the law governing this case."

Instruction number 5, states that before the plaintiff may recover he must prove, "That the defendant was guilty of negligently operating the automobile which he is alleged to have been operating at the time and place in question." Instruction number 8, is as follows: "Negligence is defined by the law to be the omitting to do something that a reasonably prudent person would do under the same or similar circumstances, or the doing of something that a reasonably prudent person would not do under the same or like circumstances." Instruction number 9, is as follows: "The term "due care and caution," as used in these instructions,

means that degree of care and caution that an ordinary careful and prudent person would have exercised under the same or similar circumstances, as disclosed by the evidence in this case."

It must be conceded that under the facts in this case instruction number one, would be improved by striking therefrom the words, "Now exists in this State, and." However, we are of the opinion that the jurors, acting as reasonable and intelligent persons, understood from all the instructions, that it was sufficient proof for a verdict in favor of the plaintiff, if he proved negligence on the part of the defendant, as required in the instructions given. We are not willing to adopt as convincing, and as a ground for reversal of the judgment, any assumption underlying the argument that the jurors were confused by instruction number 1, and in their confusion, applied a rule of law governing the proof not stated in the instructions, rather than request the court for further instruction. That the jury was misled by instruction number one, is an assumption not warranted, as it finds no support when they are considered together. From a review of the evidence, and the conduct of the trial, we think the judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

41090

IRWIN H. KELLER, Plaintiff-Appellee, vs. CHRISTOPHER L. ANTON, et al., Defendants. IDA RUSSELL MACK, Defendant-Appellant.	INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

304 I.A. 26

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ida Russell Mack, a defendant, from an interlocutory order entered October 24, 1939, appointing H. Hoyt Thompson receiver of certain premises in an action brought September 12, 1939, by plaintiff Irwin H. Keller, to foreclose a trust deed. The order was entered upon the showing made by plaintiff in his bill as amended, which was verified, also upon the verified petition of the plaintiff and after oral evidence had been taken in open court. It appears from the bill and from the petition that the trust deed in question was executed November 29, 1932, by Christopher L. Anton, a bachelor, who being indebted in the sum of $6000.00 on the same day delivered his promissory note for that amount due five years after date without interest until maturity. A copy of the note is attached to the bill. The Chicago Title and Trust Company was the trustee named in the trust deed, which conveyed the real estate and the rents, issues and profits thereof, a copy of the deed being attached to the bill of complaint.

The trust deed contained the usual provisions as to the rights of the holder of the note in case of default in payment of principal, interest or taxes, etc., and provided that upon such default the court might at once, without notice, appoint a receiver upon the filing of a bill. The bill prayed for the appointment of such receiver pendente lite setting up defaults in these respects and for a decree of foreclosure. Apparently, by inadvertence, the bill as originally filed failed to allege that plaintiff was the owner of the

[illegible]

LEWIS E. SIGLER,

Plaintiff-Appellee,

vs.

CONSTANCE L. [illegible], et al.,

Defendants.

IDA RUSSELL BECK,

Defendant-Appellant.

Appellate Court
First District
Chicago, Illinois
May [illegible],

30-1-A. 26

MR. PRESIDING JUSTICE MCCONNEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ida Russell Beck, a defendant, from an interlocutory order entered October 24, 1930, appointing A. Guy Thompson receiver of certain premises in an action brought September 12, 1930, by plaintiff Lewis E. Sigler, to foreclose a trust deed. The order was entered upon the showing made by plaintiff in his bill as amended, which was verified, also upon the verified petition of the plaintiff and after oral evidence had been taken in open court. It appears from the bill and from the petition that the trust deed in question was executed November 20, 1927, by Constance L. [illegible], a bachelor, who being indebted in the sum of $8000.00 on the same day delivered his promissory note for that amount due five years after date without interest until maturity. A copy of the note is attached to the bill. The Chicago Title and Trust Company was the trustee named in the trust deed, which conveyed the real estate and the rents, issues and profits thereof, a copy of the deed being attached to the bill of complaint.

The trust deed contained the usual provisions as to the rights of the holder of the note in case of default in payment of principal, interest or taxes, etc., and provided that upon such default the court might at once, without notice, appoint a receiver upon the filing of a bill. The bill prayed for the appointment of such receiver pendente lite setting up defaults in these respects and for a decree of foreclosure, [illegible], by [illegible]. The bill as originally filed failed to allege that plaintiff was owner of the

note and trust deed, and the amendment of October 24 was filed for the purpose of curing that defect. The petition for receiver was filed October 10. In it plaintiff averred ownership. The provisions of the trust deed showed that the property conveyed was a 3-story brick building more than fifty years old, situated in a neighborhood in which values had greatly depreciated; that the defendants in possession had permitted the property to deteriorate; that the porches, stairways, hallways and apartments had become dilapidated, in need of repair and dangerous to life; that the heating equipment had been misused and mishandled and was so broken as to endanger the property itself; that the mortgagor had left the jurisdiction of the court, so that a deficiency could not be collected from him; that the sale of the property at foreclosure would result in a substantial loss; that there was due and owing to the County Collector as general real estate taxes for the years 1930 to 1939, plus penalties thereon, a total sum of between $3000.00 and $3500.00; that the party in possession had been collecting the rents and using the income for his own benefits, never paying taxes, interest or principal; that the note was in default; that the property was evaluated at $8000.00, which was entirely inadequate for the interest, costs, notes, expenses, etc.

The petition was duly verified by the plaintiff, was filed, and by order of the court defendants were given five days to answer, and the hearing set down for October 20, 1939. The defendants made a motion to strike the petition and dismiss the complaint, which was afterward withdrawn. Plaintiff was given leave to file the amendment instanter and rule was entered on defendants to file their answer within ten days. The case was continued until October 20, without further notice.

October 24, defendants filed a general appearance, and were given twenty days to answer. The order recites that the motion came on for hearing upon the complaint and petition; that the trust deed conveyed not only the real estate but the rents and issues and profits; recited the provisions of the trust deed as to breach and de-

note and trust deed, and the amendment of October 24 was filed for the purpose of curing that defect. The petition for receiver was filed October 10. In it plaintiff averred ownership. The provisions of the trust deed showed that the property mortgaged was a 3-story brick building more than fifty years old, situated in a neighborhood in which values had greatly depreciated; that the defendants in possession had permitted the property to deteriorate; that the revenue, ultimately, failing to operate had become difficult. In view of exigent and dangerous to life: that the heating equipment had been stolen and wiring and plumbing had been so damaged as to endanger the property itself; that the mortgagee had left the jurisdiction of the court, so that a deficiency might be collected from them; that the rents of the property at foreclosure would result in a substantial loss; that there was due and owing to the Court mortgagee on general tax arrearages for the years 1930 to 1939, plus penalties thereon, a total sum of between $2000.00 and $3000.00; that the party in possession had been collecting the rents and using the income for his own benefit, never paying taxes, interest or principal; that the rule was in default; that the property was evaluated at $2000.00, which was entirely inadequate for the interest, rents, taxes, expenses, etc.

The petition was duly verified by the plaintiff, was filed, and by order of the court defendants were given five days to answer, and the hearing set down for October 30, 1939. The defendants made a motion to strike the petition and dismiss the complaint, which was stricken without prejudice. Plaintiff was given leave to file the amendment instanter and rule was entered on defendants to file their answer within ten days. The case was continued until October 31, without further action.

October 31, defendants filed a general demurrer, and were given twenty days to answer. The order provides that the matter came on for hearing upon the demurrer and pleadings; that the trust deed executed not only the real estate but the rents and income and provides the provisions of the trust deed as to demand and de-

fault, and further recites "and it appearing to the court that the premises are meager and scant security for the indebtedness secured by said trust deed, and that it will be necessary to resort to the rents, issues and profits of the property in order to sufficiently satisfy the said indebtedness, and it further appearing that notice of the application for the appointment of a receiver has been served upon the present owner of the premises conveyed by the trust deed herein sought to be foreclosed, and upon hearing argument of counsel and the court being fully advised in the premises" the court finds that the receiver should be appointed to immediately take charge and possession, etc.

This notice of appeal was filed by certain of defendants (whether owners of the title does not appear) on November 22, 1939. The praecipe for transcript of the record contains directions to prepare as a part of the transcript a report of proceedings showing the evidence taken. A report of proceedings was presented but was not approved by the trial judge, so that the evidence upon which the court acted is not preserved for review.

It is urged that the bill as originally filed was defective in that it failed to allege plaintiff was the owner of the note and trust deed. This technical defect was, however, cured by amendment. A question is raised as to the form of the verification of the bill and of the amendment, citing Grabowski v. MacLaskey, 257 Ill. App. 484. The form of the affidavit has, however, been approved in numerous cases. Farrell v. Heiberg, 262 Ill. 407; Smiley v. Lavane, 363 Ill. 66-73; Peterson v. Ashphalt Sales Corp., 235 Ill. App. 592; Reliance Bank & Trust Co. v. Dalsey, 263 Ill. App. 546 and Althausen v. Kohn, 222 Ill. App. 324-326. Moreover, the court having heard oral evidence upon the motion to appoint the receiver, the form of verification of the bill and petition is unimportant. While the bill when filed was technically defective in the respect already indicated, that defect was cured by amendment filed on the day the order appoint-

fault, and further recites that it appearing, to the court that the petitioner has ample and exact security for the indebtedness evidenced by said trust deed, and that it will be necessary to resort to the rents, issues and profits of the property in order to sufficiently satisfy the said indebtedness, and it further appearing that notice of the application for the appointment of a receiver has been served upon the present owner of the premises conveyed by the trust deed herein sought to be foreclosed, and upon hearing argument of counsel and the court being fully advised in the premises, the court finds that the receiver should be appointed to immediately take charge and possession, etc.

This notice of appeal was filed by certain of defendants (whether owners of the title does not appear) on November 22, 1920. The passage for transcript of the record contains directions to prepare as a part of the transcript a report of proceedings showing the evidence taken. A report of proceedings was presented but was not approved by the trial judge, so that the evidence upon which the court acted is not preserved for review.

It is argued that the bill as originally filed was defective in that it failed to allege plaintiff was the owner of the note and trust deed. This technical defect was, however, waived by demurrer. A question is raised as to the form of the verification of the bill and of the answer, citing Wadsworth v. Thomsen, 67 Ill. App. 484. The form of the affidavit has, however, been approved in numerous cases. Farwell v. Bolmer, 88 Ill. 407; Butler v. Lawson, 102 Ill. 66-71; Peterson v. Lamontagne Manufacturing Co., 77 Ill. App. 497; Williams Bank & Trust Co. v. Dalsey, 220 Ill. App. 346 and Hitchcock v. Hohn, 242 Ill. App. 325-330. Moreover, the court having heard oral evidence upon the motion to appoint the receiver, the form of verification of the bill and petition is unimportant. While the bill when filed was technically defective in the respect already indicated, that defect was cured by amendment filed on the day the order appoint-

ing the receiver was entered. The production of the note and trust deed would be prima facie evidence of ownership. The undenied facts which were made to appear upon the hearing of the motion show an abundant justification for the appointment of the receiver in that the owner of the premises had disappeared; that the building was fifty years old, was allowed to become in a state of disrepair and taxes were unpaid for almost ten years. The objections of the defendants are purely technical and without any merit whatsoever.

The briefs of the appellant contain much scandalous matter, including wholly unwarranted accusations as to the prejudice of the trial judge. The motion heretofore made to strike appellant's brief was denied. Upon full consideration of these briefs and after oral argument, we regret to say that we are of the opinion that such an order should now be entered. Action at an earlier date would have only served to delay the decision of the case with possible injustice to the parties. Therefore, in conformity with what we think the best practice, the briefs of appellant will be stricken from the files of the court and the order of the trial court affirmed. Royal Arcanum v. Greene, 237 U.S. 531-546.

ORDER AFFIRMED.

O'Connor and McSurely, JJ., concur.

by the receiver was entered. The production of the note and trust deed would be prima facie evidence of ownership. The unnamed facts which were made to appear upon the hearing of the motion show an absolute justification for the appointment of the receiver in that the owner of the premises had disappeared; that the building, one fifty years old, was allowed to become in a state of disrepair and taxes were unpaid for almost ten years. The objections of the defendants are purely technical and without any merit whatever.

The brief of the appellant contain much searching matter, indicating wholly unwarranted suspicions as to the propriety of the trial judge. The motion heretofore made to strike appellant's brief was denied. Upon full consideration of those briefs and after oral argument, we regret to say that we are of the opinion that such an order should not be entered. Action at an earlier date would have served to delay the decision of the case with possible injustice to the parties. Therefore, in conformity with what we think the best practice, the brief of appellant will be stricken from the files of the court and the order of the trial court affirmed. Ingal Anderson v. Greene, 127 P.R. 201-202.

WRIT AFFIRMED.

O'Connor and Monnerly, JJ., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9461 AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT,

OCTOBER TERM, A. D. 1939.

JOSEPH POLLACK, Appellant, vs. THE COUNTY OF DUPAGE, a municipal corporation, et alk, Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF DUPAGE COUNTY.

HUFFMAN - J.

This case comes to this court by transfer from the Supreme Court. It is a suit by appellant seeking to restrain appellees from the enforcement of a zoning ordinance with respect to a tract of ground referred to as Lot 5, in Branigar Brothers' Ogden Avenue Farms. The suit was predicated on the ground that the ordinance was unconstitutional. The court dismissed the complaint for want of equity, and appellant prosecuted this appeal to the Supreme Court, on the theory that constitutional questions were involved. There was no certificate by the trial court that the validity of an ordinance was involved and that in its opinion the public interest required an appeal to be taken to the Supreme Court. It appears that upon a hearing before the Chancellor, the ordinance was admitted in evidence without objection and no question presented which required the trial court to pass upon any constitutional question. Under such circumstances, the Supreme Court took no jurisdiction of the appeal.

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT,

OCTOBER TERM, A. D. 1939.

Appellee,	
vs.	APPEAL FROM THE CIRCUIT
THE COUNTY OF DUPAGE, a municipal corporation, et al.,	COURT OF DUPAGE COUNTY.
Appellees.	

DUFFNAN - 3.

This case comes in this court by transfer from the Supreme Court. It is a suit by nonresident owners of subdivision property from the enforcement of a zoning ordinance with respect to a tract of ground contained in an lot 7, in Overlook Terrace, Cedar Avenue Park. The suit was predicated on the ground that the ordinance was unconstitutional. The court dismissed the complaint for want of equity, and appellant prosecuted this appeal to the Supreme Court, on the theory that constitutional questions were involved. There was no certificate by the trial court that the validity of an ordinance was involved and that in its opinion the public interest required an appeal to be taken to the Supreme Court. It appears that upon a hearing before the Chancellor, the ordinance was admitted in evidence without objection and no question presented which required the trial court to pass upon any constitutional question. Under such circumstances, the Supreme Court took no jurisdiction of the appeal.

On page 202 of the opinion (Pollack v. County of DuPage, 371 Ill. 199) the court makes the following statement: "Evidence upon facts relating to the acquisition of Lot 5 and the use of that and other land was introduced and was in conflict. The court heard all the evidence and dismissed the complaint for want of equity." The above expression reflects appellant's position in this court.

The ordinance was adopted in December, 1935. It provided that it should not be exercised so as to deprive the owner of any existing property, in its use or maintenance, for the purpose to which it was then lawfully devoted.

Appellant alleged that he had been in the open, notorious, and exclusive possession of Lot 5, as a tenant, for more than 2 years prior to the date of his acquiring title thereto, and during all of said time used the lot for the storing and wrecking of motor vehicles; that the ordinance was unreasonable, arbitrary, and oppressive; and contrary to the statute. He further contended that he had been tenant of the lot from 1933, to the time he acquired title thereto, using it during all this time for the above mentioned purpose. However, this question was in sharp dispute. The parties who held the title during such time testified that appellant was not tenant of the premises with their knowledge or consent. He does not claim to have paid rent to any one. Six witnesses testified for appellee, who stated that they were familiar with the premises, saw the lot frequently, and observed no junk or cars thereon until the spring of 1937.

John W. Hotchstetter acquired title to the lot in 1924. He conducted a refreshment stand thereon for some time. He lost the lot in 1932, for failure to pay taxes. He states that during

On page 202 of the opinion (Pollock v. County of Dupage, 271 Ill. 199) the court makes the following statement: "Evidence upon facts relating to the acquisition of lot 5 and the use of that and other land was introduced and was in conflict. The court heard all the evidence and dismissed the complaint for want of equity." The above expression reflects appellant's position in this court.

The ordinance was adopted in December, 1925. It provided that it should not be enforced so as to deprive the owner of any existing property, in its use or maintenance, for the purpose to which it was then lawfully devoted.

Appellant alleged that he had been in the open, notorious, and exclusive possession of lot 5, as a tenant, for more than 2 years prior to the date of his acquiring title thereto, and during all of said time used the lot for the storing and wrecking of motor vehicles; that the ordinance was unreasonable, arbitrary, and oppressive; and contrary to the statute. He further contended that he had been tenant of the lot from 1923, to the time he acquired title thereto, using it during all this time for the above mentioned purpose. However, this question was in sharp dispute. The parties who held the title during such time testified that appellant was not tenant of the premises with their knowledge or consent. He does not claim to have paid rent to any one. Six witnesses testified for appellee, who stated that they were familiar with the premises, saw the lot frequently, and observed no junk or cars thereon until the spring of 1927.

John K. Hobenbeter acquired title to the lot in 1924. He conducted a refreshment stand thereon for some time. He lost the lot in 1932, for failure to pay taxes. He testes that during

his ownership thereof, he gave appellant no right or authority to occupy the premises. In 1932, Walter F. Fleming acquired title to the lot by way of tax deed. He states that during his period of ownership, he never took possession of the property, nor exercised any rights of ownership over it. In December, 1936, he was approached by Gordan Moffett with respect to the purchase of Lot 5. These negotiations resulted in a quit claim deed from Fleming to Moffett in January, 1937. On March 1, 1937, Hotchstetter executed a quit claim deed to Moffett, and on April 16, 1937, Moffett conveyed the lot to appellant.

The trial court found by its decree that appellant failed to maintain the allegations in his complaint and dismissed same for want of equity. We have reviewed the evidence carefully and do not find wherein the court erred in its decree. Decree for the defendant must stand unless evidence was presented by the plaintiff which would entitle him to the relief prayed. Ryan v. Sanford, 133 Ill. 291, 298. We find no evidence of tenancy. The evidence as to possession and use of Lot 5, by appellant, was in sharp dispute, prior to the spring of 1937. No evidence appears in support of the allegation, that the ordinance was unreasonable, arbitrary, and oppressive. The decree is therefore affirmed.

Decree affirmed.

affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JANUARY 1949 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9496 AGENDA NO. 24

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1939

LEON W. SUTHERLAND, et al., Appellants,	
vs.	APPEAL FROM THE CIRCUIT
M. D. MORGAN, et al.,	COURT OF PEORIA COUNTY.
Appellees.	

HUFFMAN - J.

The Family Wet Wash Laundry of Peoria, is a corporation engaged in the laundry business. It has an authorized capital stock of 300 shares, all of which are outstanding. It appears that the stockholders are divided into two groups, each of which is endeavoring to gain control of the corporation. The minority group is represented by appellants Kett and Sutherland. The majority group is represented by appellee Morgan, President of the corporation. Both Mr. Sutherland and Mr. Morgan are attorneys. The subject matter of this suit is stock certificate No. 35 for 50 shares of stock. Appellee Morgan and his associates are the owners of 110 shares, and appellant Sutherland and his associates are the owners of 140 shares. Thus it is apparent that certificate No. 35 for 50 shares, which is the subject of this suit, carries with it the control of the corporation.

William F. Shanemeyer was a former President of the corporation and was the owner of 50 shares of stock, which is represented by certificate No. 35. These shares were represented by certificate No. 3 when held by Shanemeyer. It appears from the report of the Master that Shanemeyer became financially involved and had his stock certificate No. 3 for 50 shares, pledged with the Herget National Bank of Pekin, Illinois, as collateral security to a note; that Edward N. Kett, husband of appellant, attempted to buy this note from the bank in order to gain possession of the pledged stock certificate, and thus secure control of the corporation; that appellee Morgan, to protect Shanemeyer, purchased the note from the bank and subsequently returned it and the stock certificate to Shanemeyer. Thereafter, Shanemeyer resigned as President, and Morgan succeeded him. Edward Kett and certain of his associates had been in active charge of the laundry while Shanemeyer was President, and continued in this capacity after Morgan became President.

In the latter part of 1934, it appears that attempts were again made by the minority group to gain control of the company, by the taking of certain judgments by appellant Sutherland for certain of his clients, and by bill for receivership, which was upon hearing dismissed. Appellant Kett, her husband, and certain of their associates, advanced a loan to the corporation, taking a chattel mortgage on the plant to secure same. It appears that Kett permitted the loan to become in default at a time when the corporation had sufficient funds to meet the loan requirements; that a suit to foreclose the chattel mortgage was instituted but never carried to conclusion; that thereafter, Kett was removed from the management of the laundry and Shanemeyer took over his duties as manager; that thereafter, the corporation discharged

William T. Shannonover was a former President of the corporation and was the owner of 30 shares of stock, which is represented by certificate No. 39. These shares were represented by certificate No. 3 when held by Shannonover. He admitted that the records of the corporation showed Shannonover's ownership of the shares represented by his stock certificate No. 3 for 30 shares. Against this the Plaintiff National Bank of Fairfax, Illinois, as collateral security to a note; this Edward V. Hall, President of Shannonover, pressured to buy this note from the bank in order to gain possession of the stock certificate, [illegible]

tion; that creditor [illegible], to produce Shannonover, [illegible] and to [illegible] Treadwell, and Morgan succeeded him. Edward V. Hall and another of his associates had been in active charge of the Lumber while Shannonover was [illegible] Bright Banks [illegible].

In the [illegible] of 1920, [illegible] again made by the minority group to get control of the company; by the taking of certain [illegible] [illegible] for certain of his clients, he by bill [illegible], [illegible] [illegible] [illegible].

of their associates, borrowed a loan to the corporation, [illegible] a certain mortgage on the plant to secure [illegible]. He [illegible] that permitted the loan to issue in [illegible] [illegible] corporation had sufficient funds to [illegible] the loan [illegible] that a suit to foreclose the [illegible] [illegible] never intended to consummate; that [illegible], [illegible] from the management of the Lumber [illegible] [illegible] duties as manager; since Shannonover, the corporation [illegible]

$17,000 of the mortgage indebtedness and made improvements in the plant to the sum of about $15,000.

The 50 shares of stock later appears to have been held by one H. E. Pratt as security for indebtedness of Shanemeyer; that Kett endeavored to buy the stock certificate from Pratt; that later the certificate was redeemed from Pratt by Earl Shanemeyer, a brother of William F. Shanemeyer, and a stock certificate No. 35 issued to C. L. Hughes at Shanemeyer's request, which certificate was endorsed in blank by the said Hughes and delivered to Earl Shanemeyer, the brother of William F. Shanemeyer. The above occurred on or about March 8, 1937.

Prior to the above transfer of stock and the issuance of certificate No. 35 in lieu of certificate No. 3, one Thomas Lally filed suit for an injunction, seeking to restrain the transfer of certificate No. 3 by Shanemeyer. The Master found that Kett and Sutherland were interested in that suit. It appears that suit was dismissed on May 10, 1937. In March, 1937, Shanemeyer negotiated with Carl Gerdes for a loan and pledged to him certificate No. 35, which had been issued in lieu of certificate No. 3. It appears that Hughes was present and a loan was arranged for, and said certificate No. 35 pledged as collateral thereto. Hughes executed a note for such loan. It appears that Gerdes had an associate who put up part of the money for the loan, but that subsequent to making same, Gerdes paid his associate his portion of the money advanced, and the note and stock certificate were then held by Gerdes individually. It appears to be at this stage of the transactions that the matters out of which this case arose, took place.

$47,000 of his mortgage indebtedness and made improvements in the plant to the tune of about $8,000.

The 50 shares of stock later proved to have been held by one R. W. Platt is according the information of Accountant; that Jack endorsed to by the above certificates that Platt; that Jack certificates was returned from Lucy A. Blue Shoemaker, a brother of Jackson S. Shoemaker, and a check certificate No. 15 issued to C. A. Pegram in Shoemaker's name; while certificate [illegible] Hughes and delivered to Earl Shoemaker, who handed it Jackson S. Shoemaker. The store counter on or about March 6, 1937.

Prior to the above transfer of 50 shs and the issuance of certificate No. 15 in lieu of certificate No. 3, one [illegible] daily sold with for an indorsement, requiring to authorize transfer of certificate No. 3 by Shoemaker. The Auditor testified that [illegible] and Shoemaker were interested in such sale. It appears that this was discussed on Feb 26, 1937. At noon, 1:15, Shoemaker reported with Earl Shoemaker for a loan and pledged to him certificate No. 15, "if he had been issued in lieu of certificate No. 3. It appears Earl Shoemaker was present and a loan was arranged for, and said certificate No. 15 pledged to collateral therefor. Pegram executed a note for that loan. It appears that Shoemaker and an associate who put up part of the money for the loan, was then endeavoring to raise cash. Pegram paid his assessments his portion of the money received, and the note and stock certificate were then held by Shoemaker individually. It appears he is in full charge of the corporation from the beginning and of which Earl Shoemaker, Vice President.

Appellant Sutherland, on May 4, 1937, negotiated with Gerdes for certificate No. 35. Whereupon, Gerdes delivered the certificate to Sutherland. It had previously been endorsed in blank by Hughes, in whose name it was issued. Sutherland inserted his name in the blank assignment for the transfer thereof, and presented it to appellee Morgan with request that the stock be transferred to Sutherland. The Master found that Gerdes negotiated this transaction without giving any notice to the parties who had secured the loan and pledged the stock. The loan was not due at the time. Appellants claim that Gerdes represented to them that he was the owner of the stock and had a right to sell it, and would sell it to them if they would agree to purchase certain other shares of like stock from him at a price fixed by him; and that pursuant to such an agreement, they purchased from Gerdes certificate No. 35, and signed an agreement to purchase the other stock in said corporation upon the terms as fixed by Gerdes. Gerdes denies that he made such representation to Sutherland and Kett about certificate No. 35, and claims that he told them both that he held this certificate as security for a loan to Shanemeyer. While certificate No. 35 was still in the possession of appellee Morgan, and before any transfer thereof had been made to Sutherland, Hughes instituted a replevin suit in the circuit court of Peoria county against the secretary of the corporation, to recover possession of said certificate. The said Hughes thereby obtained possession of such certificate. Upon thus obtaining possession of the certificate, Hughes struck out the name of Sutherland on the reverse side thereof and inserted the name of A. H. Kahler, and upon

request of Shanemeyer, the certificate was delivered to Kahler. Kahler subsequently surrendered the certificate and caused to be issued certificate No. 38 for the same stock. This was in May, 1937. In the following December, Kahler, who is not a party to this suit, assigned certificate No. 38, to one Abe M. Silberstein, whereupon certificate No. 38 was surrendered and certificate No. 39 issued to Silberstein on December 16, 1937, for the said 50 shares of stock, and Silberstein is now the record owner thereof. The Master found that Kahler and Shanemeyer were parties interested in the subject matter of the litigation and were not made parties to the suit; that he considered them necessary and proper parties before the cause could proceed to a final decree. It was the further conclusion of the ~~Master~~ Master that the bill should be dismissed for want of equity.

This suit was brought by appellants to compel appellees to transfer upon the books of the corporation 50 shares of the capital stock thereof, to them, and to issue a certificate therefor; and for an injunction restraining appellees from voting or permitting any other person to vote, the 50 shares of stock represented by the various transactions heretofore set out.

It appears that all the parties understood that the 50 shares of stock represented by certificate No. 35 and issued in the name of Hughes, was in truth and in fact, owned by Shanemeyer. Gerdes appears to have fully understood the situation when he advised Hughes and Shanemeyer that he had made arrangements for the loan from Conigisky. The amount of this loan was $2770. Certificate No. 35, was endorsed in blank by Hughes and left with Gerdes to be used as collateral security.

Gerdes appears to have sold the certificate to appellants for $5000. One, Smallenberger, advised Hughes of the sale of the certificate by Gerdes to appellants. When Hughes conveyed this information to Shanemeyer, it was decided to replevin the stock certificate. Hughes says this was done, and upon the same coming to his possession he transferred it on the back to Al Kahler. Hughes states that he did not sell the certificate to Gerdes nor authorize him to sell it; that he has not received back his note for $2770 which he signed for Shanemeyer. He states that he had no financial interest in the stock, and that he made the transfer of certificate No. 37, to Kahler at Shanemeyer's direction.

Gerdes states that Hughes and Shanemeyer came to his home, where Shanemeyer requested a loan of $2770 on this stock certificate No. 37; that pursuant thereto he arranged with one Coney, to furnish $2000 for the loan; that the certificate for 50 shares was delivered to him and that he delivered it to Coney; that it appeared in the name of Hughes; that two notes were signed and the notes and stock were left with Coney, and Gerdes put up the rest of the money to complete the $2770. Gerdes says that he heard that Shanemeyer was in bad shape and was thinking of going to Texas; that he thereupon looked up Kett to find out what he could about the situation at the Laundry; that he told Kett he had a loan on a certificate of stock and that he was worried about it; that Kett told him that none of the stock would be worth anything when he foreclosed, and that Kett told him he had to foreclose; whereupon Gerdes offered to sell his certificate No. 37, to Kett; that he damanded $5000 therefor; that Kett came back in a few days and said he would give $5000 for the

certificate, but first wanted to know if Shanemeyer had any documentary evidence to show that the certificate was up as security for a loan; whereupon, Gerdes states that he said: "Shanemeyer hasn't got the scratch of a pen." Gerdes states that he advised Kett he would not sell this certificate unless he bought other stock in the laundry, and that an agreement therefor was drawn up at Kett's house, and that Mrs. Kett (appellant) signed such agreement; whereupon, the entire transaction as between Gerdes and the Ketts, was closed. Gerdes admits that he was not the owner of the stock; never had any interest in the same except as security for the loan; and denies that he told Kett he owned the stock, but says he told him he held it as collateral to the loan. He further says that he did not tell Kett when the loan was due. He claims that after he received the note from Conigisky, he destroyed it. He admits he did not advise Shanemeyer or Hughes or anyone that he was going to sell the stock, and that he was not authorized by them to sell it. He says, "I was told that he (meaning Shanemeyer) had folded up and left here and wasn't interested anymore, so that -- any port in a storm."

Morgan states that Kett attempted to buy the notes at the Morgot National Bank, which were secured by Shanemeyer's stock; that Shanemeyer was insolvent and at the time was President of the laundry; that Kett came to his office and told him that he was going to get rid of Shanemeyer by hook or crook; that he was broke; and wanted Morgan to assist him; that Morgan refused in this regard; that the laundry was in debt and not making any money; that Morgan had Shanemeyer resign as President and became President himself; whereupon he told Kett and his associates who

were in active charge of the laundry, to go to work and take care of it and quit trying to get control of the stock; that a certain mortgage indebtedness was coming due; that Kett again came to his office and told him he was going ahead with his plan to secure stock and offered to buy Morgan's stock, and that Kett said he would get the stock or wreck the company; that all the creditors were going to cooperate with him; that subsequently a judgment for $20,000 was taken against the corporation and a bill filed in Federal court for receivership, which was later dismissed; that the corporation had to file under Sec. 77b of the Bankruptcy Act; after which a plan was worked out to refinance its indebtedness of $40,000; that Kett offered to advance the money and a loan was worked out; that when the first payments came due under this loan, Kett permitted them to become in default; that he had plenty of money to pay them, which belonged to the corporation, but that instead of paying the indebtedness, he bought certificates of deposit in the name of the company; that Kett created a default in the chattel mortgage and suit was started to foreclose same; that Morgan then had Kett dismissed as manager and took over the management of the laundry himself; that he put Shanemeyer in active charge, and since that time has paid off $17,000 on the mortgage in a period of about a year, and made $16,000 worth of improvements.

Although the evidence in the case has been fully reviewed, yet we do not consider any further recital of same necessary. This appears to be a contest between the minority and majority stockholders of this laundry company to secure control thereof. It appears that Hughes obtained possession of his stock certificate by replevin suit, and that he transferred same to Kahler;

that a new certificate therefor issued to Kahler; and that he in turn has made transfer thereof. The entire authorized capital stock consists of 300 shares and they are now fully issued. Gerdes does not maintain that he had any right to sell the stock certificate or that he made any demand on Hughes or Shaneneyer for payment of his loan prior to selling same. He admits the loan was not due, and in the sale of this stock certificate for an amount nearly twice the value of the loan, also forced Kahler and his wife to sign an agreement to buy other stock in this laundry, at his own price.

The trial court dismissed the bill for want of equity, thus leaving the parties where he found them, and we quite agree with his conclusion.

The decree is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9505 AGENDA NO. 30

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT,

OCTOBER TERM, A. D. 1939.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ALBERT SULLIVAN, Plaintiff in Error.	ERROR TO THE CIRCUIT COURT OF HENRY COUNTY.

HUFFMAN - J.

Plaintiff in error was convicted before a jury, for a violation of sec. 376, of the Criminal Code. Pursuant to the finding of the jury the court assessed a fine of $300 against plaintiff in error and ordered that he be committed to the common jail of said county until the fine and costs were paid, or until discharged in due course of law.

Plaintiff in error was President of the Cleaners and Dyers Union of Kewanee. Vernon Denney operated a cleaning and pressing establishment in Kewanee. The clothing he received was taken by motor truck to a cleaning and pressing establishment in the City of Bloomington, Illinois, where the work was actually done. The said Denney thus transported by motor truck, the clothing he received for cleaning and pressing, to the establishment at Bloomington, and later transported same from the establishment there to Kewanee, where it was returned to the owners. The

IN THE APPELLATE COURT OF ILLINOIS,

FOURTH DISTRICT,

OCTOBER TERM, A. D. 1929.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error, vs. ALBERT SULLIVAN, Plaintiff in error.	ERROR TO THE CIRCUIT COURT OF HENRY COUNTY.

MCCULLOUGH - J.

Plaintiff in error was convicted before a jury, for a violation of sec. 276, of the Criminal Code. Pursuant to the finding of the jury the court assessed a fine of $200 against plaintiff in error and ordered that he be committed to the common jail of said county until the fine and costs were paid, or until discharged in due course of law.

Plaintiff in error was President of the Cleaners and Dyers Union of Kewanee. Vernon Denney operated a cleaning and pressing establishment in Kewanee. The clothing he received was taken by motor truck to a cleaning and pressing establishment in the City of Bloomington, Illinois, where the work was actually done. The said Denney thus transported by motor truck, the clothing he received for cleaning and pressing, to the establishment at Bloomington, and later transported back from the establishment there to Kewanee, where it was returned to the owners. The

driver of his truck was one Robert Sutphen. Denney's prices for cleaning and pressing were below that charged by most of the other cleaning and pressing establishments located in Kewanee.

On May 31, 1939, as Sutphen was making a trip from Kewanee to Bloomington with about 100 garments for cleaning and pressing, he was stopped by a car which pulled up alongside his truck and directed him to stop. Sutphen pulled the truck over to the side of the road and stopped. He states that plaintiff in error was one of the parties who stopped him; that he came to the cab of the truck and stated that they were sent out to wreck the truck and the driver; that he then entered the cab with Sutphen, and sat down beside him; that two other persons were in the company of plaintiff in error; that plaintiff in error was the only one who came to the front of the motor truck; that the driver's seat was separated from the rest of the truck; that the back of the driver's cab was solid, and Sutphen could not look into the truck body; that plaintiff in error sat in the cab of the truck on the seat beside Sutphen, where the two of them engaged in a conversation. Sutphen says that plaintiff in error stated to him that he was sent out to wreck the truck and driver, but that since Sutphen was a union driver, they would not do anything to him at that time, but that he had better not come back to Kewanee after any more clothes and that Denney who operated the establishment, had better not come into Kewanee unless he was a union man. The driver states that plaintiff in error told him that if he came back into Kewanee to pick up any more clothes he would have to stand the consequences; and

driver of his truck was one Robert Sutphen. Denney's prices for cleaning and pressing were below that charged by most of the other cleaning and pressing establishments located in Kewanee.

On May 21, 1929, Mr Sutphen was making a trip from Kewanee to Bloomington with about 100 garments for cleaning and pressing, he was stopped by a car which pulled up alongside his truck and directed him to stop. Sutphen pulled the truck over to the side of the road and stopped. He states that plaintiff in error was one of the parties who stopped him; that he came to the cab of the truck and stated that they were sent out to wreck the truck and the driver; that he then entered the cab with Sutphen, and sat down beside him; that two other persons were in the company of plaintiff in error; that plaintiff in error was the only one who came to the front of the motor truck; that the driver's seat was separated from the rest of the truck; that the back of the driver's cab was solid, and Sutphen could not look into the truck body; that plaintiff in error sat in the cab of the truck on the seat beside Sutphen, where the two of them engaged in a conversation. Sutphen says that plaintiff in error stated to him that he was sent out to wreck the truck and driver, but that since Sutphen was a union driver, they would not do anything to him at that time, but that he had better not come back to Kewanee after any more clothes and that Denney who operated the establishment, had better not come into Kewanee unless he was a union man. The driver states that plaintiff in error told him that if he came back into Kewanee to pick up any more clothes he would have to stand the consequences; and

that if he did so, he would get into a jam. The driver identifies the plaintiff in error as the man who sat beside him on the seat and had the above conversation with him. Sutphen says he heard a conversation between plaintiff in error and one of the others who was in his company, that plaintiff in error told the other party to look in the back of the truck and see what kind of a load the driver had; that the other person opened the back door of the truck and stated that he had a pretty good load of clothes. Sutphen says plaintiff in error was in the cab with him 10 or 15 minutes.

Upon plaintiff in error's leaving the truck the driver proceeded on his way. When he reached Galva he stopped the truck and opened the back, when he found the clothes were smoking and ruined by an acid that had been thrown on them.

Plaintiff in error sought to establish an alibi and offered the evidence of witnesses to sustain same. This case was purely one of fact for the jury. In the state of the record this court is not disposed to disturb the verdict.

The judgment is therefore affirmed.

Judgment Affirmed.

that if he did so, he would get into a jam. The driver identifies the plaintiff in error as the man who sat beside him on the seat and had the above conversation with him. Stephen says he heard a conversation between plaintiff in error and one of the others who was in his company, that plaintiff in error told the other party to look in the back of the truck and see what kind of alloed the driver had; that the other person opened the back door of the truck and stated that he had a pretty good load of clothes. Stephen says plaintiff in error was in the cab with him 10 or 15 minutes.

Upon plaintiff in error's leaving the truck the driver proceeded on his way. When he reached Galva he stopped the truck and opened the back, when he found the clothes were smoking and ruined by an acid that had been thrown on them.

Plaintiff in error sought to establish an alibi and offered the evidence of witnesses to sustain same. This case was purely one of fact for the jury. In the state of the record this court is not disposed to disturb the verdict.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

304 Ill. App

38704

MASTER BARBERS ASSOCIATION OF CHICAGO, a corporation, etc., et al.,
Appellees,

v.

JOSEPH BAIATA et al., etc.

ON APPEAL OF TONY BORINO, TONY CERAMI and ANGELO NASELLO,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

304 I.A. 252

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Tony Borino, Tony Cerami and Angelo Nasello (hereinafter for convenience referred to as respondents) from an order entered August 29, 1935, which found them guilty of contempt of court and fined them $25 each for violating a permanent injunction issued pursuant to the terms of a decree entered April 15, 1935, and which denied their motion filed August 27, 1935, to vacate the decree or in the alternative to dissolve or modify the injunction. Tony Borino and Angelo Nasello consented and stipulated in writing to the entry of the decree and to the issuance of the permanent injunction. Tony Cerami did not so stipulate but he was named as a defendant, served with summons and defaulted for failure to appear or answer.

A fairly complete picture and history of this litigation from its inception is presented by the following agreed statement of facts:

"On December 18, 1934, the Master Barbers Association of Chicago, a corporation not for profit, and 2,914 members of said association, all engaged in the operation of barber shops in Chicago and its environs, filed their complaint herein against Joseph Baiata, George Batsoff, G. D. Cominos, Frank De Blasi, John P. McDonald, Silas Meardy, Frank Nudo, Louis Pagano, Herman Ross, Frank Sacco, Sam Schub, Louis Wolkenheim and William Young, all members of said Association, who are designated for convenience 'member' defendants, charging them among other things with conspiring and confederating with each other and divers other persons, firms and corporations, and of their own volition in their own behalf, to

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Tony Torino, Tony Terzad and Angelo Masello (hereinafter for convenience referred to as respondents) from an order entered August 29, 1932, which found them guilty of contempt of court and fined them $25 each for violating a permanent injunction issued pursuant to the terms of a decree entered April 13, 1932, and which denied their motion filed August 27, 1932, to vacate the decree or in the alternative to dissolve or modify the injunction. Tony Torino and Angelo Masello remonstrated and stipulated in writing to the entry of the decree and to the issuance of the permanent injunction. Tony Terzad did not so stipulate but he was named as a defendant, served with summons and defaulted for failure to appear or answer.

A fairly complete picture and history of this litigation from its inception is presented by the following agreed statement of facts:

"On December 13, 1932, the Motor Vehicle Association of Chicago, a corporation not for profit, and 7,[illegible] members of said association, all engaged in the operation of market shops in Chicago and its environs, filed their complaint herein against Joseph Balata, Sebastian Tomasello, [illegible] Tomasello, Tony Torino, Edmund, Allan Hardy, Frank Ewen, Louis Jerome, Herman Hoek, Frank Lerro, Ben Lewis, Louis Schlossberg and William Young, all members of said association, who are designated for convenience 'member' defendants, charging them among other things with conspiring and constituting with each other and divers other persons, firms and corporations, and of their own volitions in their own behalf, to

MOTOR VEHICLE ASSOCIATION OF CHICAGO, a corporation, etc., et al.,

Appellees,

v.

JOSEPH BALATA et al., etc.

On appeal of Tony Torino, Tony Terzad and Angelo Masello,

Appellants.

APPEAL FROM MUNICIPAL COURT, COOK COUNTY.

304 I.A. 242

"(a) Engage in destructive and ruinous trade competition, with the purpose and effect of unsettling or destroying the barber industry or profession in Chicago and its environs and prevent recovery for any of the plaintiffs;

"(b) To embarrass, damage, injure or destroy the plaintiff barber shops, and the plaintiff association;

"(c) To inaugurate and maintain a system of price cutting so as to compel plaintiffs to operate their respective businesses at a loss.

"(d) To deprive plaintiffs of their patrons and prospective patrons, and to injure their good will, business, investment and their ten thousand employees;

"(e) To violate the contract made by the defendants and plaintiffs with themselves and with said Association in respect of maintaining fair practices and policies toward themselves and the public.

"(f) To violate the rules, regulations and orders of the Association and its board of directors;

"(g) To induce other members to violate such rules and join such conspiracy;

"(h) To violate the President's re-employment agreement signed by all plaintiffs and defendants;

"(i) To cause the plaintiffs irreparable loss, damage, injury and expense in connection with the contracts entered into by the plaintiffs for labor under their respective contracts, the cost of business space they severally occupy, contracts for the purchase of materials, forfeiture of leases, loss of journeymen and other experienced and capable personnel, and other items of irreparable loss, damage and injury, including the destruction of the good will of the plaintiffs' businesses respectively.

"On recommendation of Master in Chancery, Wirt E. Humphrey to whom the plaintiffs' petition for a temporary injunction against said defendants was referred to take evidence and report his conclusions thereon, Judge John P. McGoorty ordered the issuance of a temporary injunction pursuant to the prayer of said complaint asking the restraining of the aforesaid acts, etc., charged against said defendants.

"As no objections were made to said order, no exceptions preserved thereto, no appeal prayed therefrom, and as this appeal is directed against: (1) The decree of court entered on April 15, 1935, pursuant to the prayer of the amended and supplemental complaint; (2) The writ of injunction issued pursuant to said decree on April 24, 1935; (3) The refusal of the court on August 29, 1935, to modify the aforesaid decree; (4) The court order of August 29, 1935, finding the appellants guilty of contempt of court for violating the aforesaid decree and writ of injunction issued pursuant thereto, and as said amended and supplemental complaint contains fully the allegations set forth in the original complaint and more, this statement of facts will concern itself with said amended and supplemental complaint and proceedings after the filing thereof.

"The aforesaid amended and supplemental complaint was filed herein on February 5, 1935, and differs from the original complaint in that:

"(a) Engage in destructive and ruinous trade competition, with the purpose and effect of destroying or injuring the business or profession in Chicago and its environs and prevent recovery for any of the plaintiffs;

"(b) To embarrass, damage, injure or destroy the plaintiff market shops, and the plaintiff association;

"(c) To inaugurate and maintain a system of price cutting so as to compel plaintiffs to operate their respective business at a loss.

"(d) To deprive plaintiffs of their patrons and prospective patrons, and to injure their good will, business, investment and their ten thousand employees;

"(e) To violate the contract made by the defendants and plaintiffs with themselves and with association in respect of maintaining fair practices and policies toward themselves and the public.

"(f) To violate the rules, regulations and orders of the Association and its board of directors;

"(g) To induce other members to violate such rules and join such conspiracy;

"(h) To violate the President's re-employment agreement signed by all plaintiffs and defendants;

"(i) To cause the plaintiffs irreparable loss, damage, injury and expense in connection with the contracts entered into by the plaintiffs for labor under their respective contracts, the cost of business space they severally occupy, contracts for the purchase of materials, furniture of leases, loss of insurance and other expenses and capable personnel, and other items of irreparable loss, damage and injury, including the destruction of the good will of the plaintiffs' businesses respectively.

"On recommendation of Barker in chancery, Mr. T. Hopkins to issue the plaintiffs' petition for a temporary injunction against defendants who proceed to take evidence and report his findings thereon, July 7th. Thereupon counsel for defendants of a temporary injunction pursuant to the prayer of said complaint enjoining the restraining of the aforesaid acts, etc., charged against said defendants.

"On no objections were made to said order, on petitions presented thereto, on general general demurrers, and on the ground: (1) The issuance of said writ of injunction issued pursuant to said decree on April 14, 1922; (2) The writ of the court on August 29, 1922, to modify the injunction decree; (4) The court order of August 29, 1922, finding the application fully at hearing of cause for modifying the injunction decree was with all legislative intent pertaining fully to allegations of fact as said material and substantial involving fully the allegations of fact in the original complaint and are, this statement of facts will demonstrate fully with such pleading and application complained and evidence after the filing thereof.

"The already recited and supplemental complaint was, right having on February 7, 1922, and differs from the original complaint in that:

"(a) The number of plaintiffs was reduced to the Master Barbers Association of Chicago and 2787 members of said Association, by reason of the suspension and death of certain of the plaintiffs;

"(b) The original 13 defendants, members of the plaintiff Association, were increased to 15;

"(c) A group of defendants who did not belong to said Association were made parties defendants under the designation of 'non-member' defendants, group 1;

"(d) Another group of defendants, not members of said Association were made parties defendants under the designation of 'non-member' defendants, group 2;

"(e) The Journeymen Barbers International Union of America, a voluntary labor association, and certain of its officers and directors, Journeymen Barbers International Union of America, Chicago Local No. 548, a voluntary labor association, and its members, officers and directors, Journeymen Barbers International Union of America, Chicago Local No. 576, a voluntary labor association, and its members, officers and directors, and the Journeymen Barbers International Union of America, Chicago Local No. 587, a voluntary labor association, and its members, officers and directors, were made parties defendants under the designation of 'Union' defendants and 'Local' defendants as the designations applied.

"On motions of plaintiffs, names of certain defendants were corrected and additional parties defendants, not members of the plaintiff association, were added to those mentioned in the amended and supplemental complaint, including various barber colleges, designated 'barber school' defendants; various department stores, designated 'department store' defendants and persons, firms and corporations whose names were not available or who could not be readily served at the time of the filing of the said amended and supplemental complaint were added under the designation of 'unknown parties.'

"Said amended and supplemental complaint contained the same allegations as in the original complaint against the original defendants; also additional charges against additional defendants including a prayer to restrain the 'Union' and 'Local' defendants from enforcing their strike order of January 20, 1935, against the plaintiffs.

"About the time of the filing of the said amended and supplemental complaint, the United States Department of Labor appointed Mr. Finley F. Bell, conciliator of said department to attempt to conciliate the differences between the plaintiffs herein who in retaliation against said strike order declared a lock-out against said 'Union' and 'Local' defendants, and immediately began to function in accordance with his appointment.

"On February 8, 1935, the plaintiffs moved the court to restrain: (a) said 'Union' and 'Local' defendants, etc., from carrying out their order of strike against the plaintiffs into effect; (b) all the defendants not covered by the temporary injunction theretofore issued, from engaging in unfair and destructive trade practices; (c) directing said defendants from taking steps which would upset a business situation which the plaintiffs sought to subject to a balanced condition, etc.

"At said time, said Finley F. Bell, Esq., informed the court of his appointment aforesaid, and that he had succeeded in suspending for thirty days, for conciliation, the aforesaid strike

"(a) The number of plaintiffs was reduced to one Harvey Lopez, a resident of Chicago and 1777 members of said Association, by reason of the withdrawal and lack of knowledge of the plaintiffs.

"(b) The original 13 defendants, members of the plaintiff Association, were increased to 31.

"(c) A group of defendants who did not belong to said Association were made parties defendants under the designation of 'non-member' defendants, group 1;

"(d) Another group of defendants, not members of said Association were made parties defendants under the designation of 'non-member' defendants, group 2;

"(e) The Journeymen Barbers International Union of America, a voluntary labor association, and certain of its officers and directors, Journeymen Barbers International Union of America Local No. 148, a voluntary labor association and officers and directors, Journeymen Barbers International Union of America, Chicago Local No. 1777, a voluntary labor association, and its members, officers and directors, were made parties defendants under the designation of 'Union' defendants and 'Local' defendants as the designations applied.

"In motions of plaintiffs, names of certain defendants were corrected and additional parties defendants, not members of the plaintiff association, were added to those mentioned in the amended and supplemental complaint, including various barber colleges, designated 'barber school' defendants; various department stores, designated 'department store' defendants and persons, firms and associations whose names were not available or was unable not to be readily ascertained at the time of the filing of the said amended and supplemental complaint were added under the designation of 'unknown parties.'

"Said amended and supplemental complaint contained the same allegations as in the original complaint against the original defendants; also additional charges against additional defendants including a prayer to restrain the 'Union' and 'Local' defendants from enforcing their strike order of January 20, 1939, against the plaintiffs.

"About the time of the filing of the said amended and supplemental complaint, the United States Department of Labor appointed Mr. Wimley K. Hall, conciliator of said department to attempt to conciliate the differences between the plaintiffs barber who in reliance upon said strike order declared a lock-out against said 'Union' and 'Local' defendants, and immediately began to function in accordance with this appointment.

"On February 6, 1939, the plaintiffs moved the court to restrain: (a) said 'Union' and 'Local' defendants, etc., from carrying out their order of strike against the plaintiffs barber shops; (b) all the defendants not served by the temporary injunction herein issued, from engaging in picketing and interfering with plaintiffs' business; (c) picketing and interfering from taking steps which would cause a boycott situation which the plaintiffs would be subject to a federal prosecution, etc.

"At said time, said Wimley K. Hall, Esq., conferred the court of the conciliation attempts, and that he had succeeded in securing for court over, for mediation, the strikers which strike

and lock-out orders, and the court being further informed that the subject matter of the conciliation and of this cause and the parties concerned were one and the same, involving a series of economic, business and social and labor factors, property rights and the public interests, which he was considering and weighing in his hearings for conciliatory measures, it was ordered that said conciliator Bell be and he was then requested to continue his hearings and the taking of evidence with regard to the subject matter of this suit and report his findings thereon to this court; that public notice of said hearings be given all particularly concerned and the public generally.

"On February 21, 1935, a similar request was made by the court to said United States Commissioner Bell with regard to additional parties defendants then added to said suit, to which requests said Commissioner Bell ascquiesced.

"As a result of said conciliatory hearings, which included testimony of over 1,200 witnesses:

"(a) The 'non-member' defendants, group 2, including the appellant Tony Borino; (b) The defendants, members of the Journeymen Barbers International Union of America, Chicago Locals Nos. 548, 576 and 587, designated as 'Union' defendants; (c) Operators of barber shops in Chicago and vicinity, members of said Unions; (d) Operators of barber shops in department stores designated as 'department store' defendants; (e) Operators of barber shops in Chicago and vicinity not members of the plaintiff Association nor the defendant 'Locals,' designated 'non-member' defendants, group 2; (f) The members of the Master Barbers Association of Chicago, plaintiffs herein, including the appellant Angelo Nasello, stipulated in writing that they wished: '(1) To avoid and eliminate wilful and unfair trade practices now prevailing and which have the effect of unsettling or depressing the barber industry or profession in Chicago and its environs; (2) to avoid and eliminate price-cutting indulged in for the purpose of depriving competitors of customers, to their injury and damage; (3) To co-operate in raising our industry to a normal level; (4) To place ourselves in harmony with the President's proposed re-employment agreement heretofore signed by us; (5) To enable members of the industry to comply with wage contracts heretofore entered into with their employes and thus eliminate perplexing business uncertainties and encourage Master Barbers to enter into agreements for leases, to make shop improvements, purchase appliances, etc.; (7) to otherwise harmonize ourselves with the letter and spirit of the National Recovery Act; (8) None of the foregoing being for the purpose of establishing a trade monopoly; and

"Whereas, His Honor, Judge John P. McGoorty, did on the 29th day of December, A. D. 1934, enter an order that an injunction issue in the above entitled cause restraining the parties thereto from, among other things, soliciting, advertising or accepting any barbering work at less than the following prices; Shaving, 25c; haircutting, 50c; beard trimming, 50c; hair singeing, 35c; plain shampoo, 50c; oil, egg and mange cure shampoos, 75c; face massage, 50c; clay massage, $1.00; hair tonic, 15c; razors honed, 50c; private or sick calls - shave or hair cut, $1.00, etc., the contents of which order is to us fully known;

"Therefore, in consideration of the foregoing and the signing hereof by each of us, It Is Hereby Stipulated and Agreed by the undersigned that any attorney of any court of record may, and he is hereby authorized and directed to file our appearance as defendants in the above entitled cause and agree therein and thereby that the Order of Injunction heretofore entered as aforesaid be, and the same become effective as against us, without further notice and without bond being

and look-out orders, and the court being further informed that the subject matter of the conciliation and of this cause and the parties concerned were one and the same, involving a series of economic, business and social and labor features, properly rights and the public interests, which he was considering and weighing in his hearings for conciliatory measures, it was ordered that said conciliator call or and he was then requested to continue his hearings and the taking of evidence with regard to the subject matter of this suit and report his findings thereon to this court; that public notice of said hearings be given all particularly concerned and the public generally.

"On February 21, 1939, a similar request was made by the court to said United States conciliator with also regard to additional parties defendants then added to said suit, to which requests said Conciliator Bell acquiesced.

"As a result of said conciliatory hearings, which included testimony of over 1,500 witnesses:

"(a) The 'non-member' defendants, group 1, including the auxiliary long Beaches; (b) the defendants members of the Fourteenth District International Union of Longshore Local 142, 142, 142 and 147, designated as 'Union' defendants; (c) Operators of barber shops in Chicago and vicinity, members of said Unions; (d) Operators of barber shops in department stores designated as 'department store' defendants; (e) Operators of barber shops in Chicago and vicinity not members of the plaintiff association but the defendant 'local' designated 'non-member' defendants, group 2; (f) The members of the barber industry associations of Chicago, plaintiff's barber, including the appellant Angelo Aquilino, stipulated in writing that they would: '(1) Do avoid and eliminate unfair and unfair trade practices in the providing and which have the effect of monopolizing the barber industry or preventing in Chicago and its environs; (2) to avoid and eliminate price-fixing including in the purpose of operating competitors of customers, to their injury and damage; (3) To no-compete in refusing our business to a normal level; (4) To place ourselves in business with the President's proposed re-employment agreement wherein signed by us; (5) To enable members of the industry to comply with wage contracts between their with their employes and thus eliminate competition between employers and and employe Barbers to enjoy the benefits, to make any improvements, purchase supplies, etc.; (7) to otherwise harmonize ourselves with the letter and spirit of the National Recovery Act; (8) None of the foregoing being for the purpose of establishing a trade monopoly; and

"Whereas, His Honor, Judge John P. McGoorty, did on the 29th day of December, A. D. 1939, enter an order that an injunction issue in the above entitled cause restraining the parties from doing among other things, soliciting, advertising or employing any barber work at less than the following prices: Shave, 25c; Haircutting, 35c; beard trimming, 30c; hair singeing, 30c; plain shampoo, 35c; egg and massage cure shampoo, 75c; face massage, 50c; ray massage, $1.00; hair tonic, 15c; reserve beard, 25c; private or sick calls - extra or hair cut, $1.00, etc., the prices of which order is to be fully known;

"Therefore, in consideration of the foregoing and the signing thereof by each of us, it is hereby stipulated and agreed by the undersigned that any violation of any order of court of this kind, and in a court of competent jurisdiction in this and adjacent states, shall be considered as a violation of the above written and agreed injunction and waive the service of the injunction heretofore entered as aforesaid by, and the same become effective as against us, without further notice and without bond being

required of the plaintiffs, or any of them, with the same force and effect as if we were or had been the or among the original defendants therein, and we each further agree that said injunction be made permanent against us, except so far as the same may be affected by any action of the National Recovery Administrator, and that of the Court.

"It Is Also Stipulated and Agreed that by signing this stipulation, the undersigned shall be excused from attending Court, shall not be held liable for any expenses or costs of the litigation to date, and hereby approve of any and all actions in behalf of the undersigned, or any of them, the said attorney, may or shall take in respect of this suit to which we hereby, under this stipulation, express our desire and give our consent to be and become subjected to.

"(g) The defendant Tony Cerami was one of the defendants who did not sign said stipulation; (h) and the 'barber-school' defendants signed a stipulation agreeing to the entry of the decree of court herein with regard to themselves.

"In other words, all the defendants and the plaintiffs, totaling approximately 7,837, except those who were defaulted and 43 of the 'non-member' defendants, group 1, (many of whom were favorably disposed thereto but were reluctant to sign a written document to that effect) agreed to the entry of a decree of court and the issuance of a writ of injunction as was herein entered and ordered.

"On March 26, 1935, United States Conciliator, Finley F. Bell notified all the parties concerned that he had prepared his report in the above entitled cause; that objections thereto could be filed in his office until April 2, 1935, at nine o'clock A. M. at which time and place he would hear arguments and dispose of such objections thereto as might be filed.

"No objections having been taken thereto and all the parties to said suit not in default, having by written stipulation agreed that said report of findings, with its summary and appendix be accepted as evidence in this case as fully as though all matters therein contained were made under oath in open court, and accepting, approving and agreeing to be bound by said report and summary and the appendix thereto, etc., and waiving all informalities and errors and agreeing to the entry of an order of court pursuant thereto, and by said stipulation ratifying and confirming all that said court may do by virtue thereof, said report was on April 4, 1935, presented to his Honor, Judge John P. McGoorty, who, so as not to preclude anyone wishing to offer any additional proofs, and so that a Master in Chancery might examine said report and make a finding as to the truth of all the allegations in the amended and supplemental complaint contained and submit to the court a firm of decree for its approval, based on said complaint and report, etc., and such additional proof as might be made herein, etc., referred the same to Master in Chancery Harry Smitz to take such additional proof as the parties hereto or the public might wish to offer, etc.

"Thereafter, said Master presented his report to this court for approval and no objection having been made thereto, but the same having been accepted and approved by the parties to said suit, etc., the court entered its decree herein pursuant thereto and ordered an injunction to issue as prayed for in said amended and supplemental complaint.

"On August 27, 1935, on motion of the plaintiffs, a rule to show cause was entered against appellants herein pursuant to plaintiffs' petition requiring said appellants to show cause why an attachment should not issue against each of them and that they be

[illegible] of the plaintiffs, or any of them, with the same force and effect as if we were or had been the or among the original defendants herein, and we [illegible] upon [illegible] and [illegible] permanent equitable [illegible] as the same may be affected by any action of the bankruptcy discovery commissioner, and that of the court.

"It Is Also Stipulated and Agreed that by signing this stipulation, the undersigned shall be excused from attending court, shall not be held liable for any misspelling or lapse of the stipulation de dove, and hereby assume of any and all actions in behalf of the undersigned, or any of them, the said attorney, may or shall take in respect of this suit to which we hereby, under this stipulation, express our desire and give our consent to be and become subjected.

"(2) The defendant Jung defend [illegible] of the defendants who did not sign said stipulation, (2) and the 'Bankruptcy-Court' defendants signed a stipulation agreeing to the entry of the decree of [illegible] in [illegible] regard to themselves.

"In other words, all the defendants and the plaintiff, [illegible] in [illegible] defendants, group 1, (many of whom were favorably disposed towards but were reluctant to sign a written document to that effect) agreed to the entry of a decree of [illegible] and the issuance of a writ of injunction as set certain forth and [illegible].

"On March 23, 1937, Samuel Stokes Coughlin, Esq. [illegible] Bell notified all the parties concerned that he had prepared his report in the above entitled cause; that objections thereto could be filed in his office until April 1, 1937, at nine o'clock A. M., at which time and place he would hear [illegible] and discuss of such objections thereto as might be filed.

"No objections being [illegible] and all the parties to said suit not in default, having by written stipulation agreed that said report of Coughlin, with [illegible] be accepted as evidence in this case as fully as though all matters therein contained were made under oath in open court, and accepting, approving and agreeing to be bound by said report and summary and the appendix thereto, and waiving all [illegible] and [illegible] and agreeing to the entry of an order of court pursuant thereto, and by said stipulation [illegible] [illegible] of [illegible] was on April 4, 1937, presented to his Honor, John J. Ledoux, who, so as not to preclude anyone wishing to offer any additional proofs, and so that a master in Chancery might consider said report and make a finding as to the truth or [illegible] in the amended and supplemental complaint herein, and [illegible] to the court a [illegible] of decree for its approval, based on said [illegible] and report, etc., and such additional proof as might be [illegible] in said [illegible], etc., referred the suit to master in Chancery Harry [illegible] to take such additional proof as the parties hereto or the public might ask to offer, etc.

"Therefore, said Master presented his report to this court for approval and no objection having been made thereto, but the same having been accepted and approved by the parties to said suit, etc., the court hereby [illegible] [illegible] and [illegible] injunction to issue as prayed for in said amended and supplemental complaint.

"On August 27, 1937, on motion of the plaintiffs, a rule to show cause was ordered issued against [illegible] pursuant to plaintiffs' written requests, and requiring to show cause why an attachment should not issue against each of them and that they be

punished for contempt of this court for their respective neglects and refusals to comply with the aforesaid decree of court and writ of injunction issued pursuant thereto, a copy of which writ of injunction the said appellants each admit having received about May 1, 1935.

"The said appellants, barber shop owners in Chicago, in answer to said petition denied that they wilfully, deliberately and maliciously violated the aforesaid writ and decree, admitted that they were charging 15c for a shave and 25c for an adult haircut, denied a conspiracy between themselves to force competitors to do likewise, etc., stated that they were compelled to co-operate together for the purpose of protecting their business interests; that they would prefer charging 25c for shaves and 50c for adult haircuts but were compelled to charge lower prices by reason of ruinous, unfair and destructive competition of others and that they are opposed to a monopoly of barber business by a limited few; that the court has no jurisdiction of the subject matter of the parties herein; that the action of the court was contrary to the constitution of this state, of the United States and of the common law of this state and of this land; that the activities charged against said appellants by plaintiffs are not illegal; that they believe in the American principle of staunch individualism; that in pursuance of said principle and under the system which has made possible the great development and progress of this country each man must rely on his own skill, ability and resources in dealing with his customers; that said American System of staunch individualism has been recognized since the founding of our country and is part of the recognized common law of the land and whether under cost selling is involved or not, is in this case immaterial, as competitors have the same right to conduct their businesses accordingly.

"On said August 27, 1935, said appellants moved the court (a) To vacate the decree of court herein entered on April 15, 1935; (b) In the event said motion to vacate said decree was denied that the permanent injunction herein be dissolved; (c) In the event said motion to dissolve said injunction was denied, that the aforesaid decree of court be modified, alleging that: 'The Court lacked and lacks jurisdiction of the subject matter and all parties hereto; The by-laws of the plaintiff Association are null and void and not binding upon these petitioners, in that among other things: (a) They provide for price fixing; (b) They stifle industry; (c) They prevent competition; (d) They are in violation of the Criminal Statute of Illinois prohibiting trusts, pools and combinations to regulate or fix the price of any article of merchandise or commodity; (e) They are contrary to public policy; (f) They are in violation of the common law of this State; (g) They are unconstitutional; (h) The respondents, Tony Borino, and Tony Cerami are not and were not members of the plaintiff Association; The Court did not have power to fix minimum prices; The plaintiffs did not state a cause of action that entitled them to a decree as was entered herein; The plaintiffs did not come into equity with clean hands and should have been denied relief; The fixing of prices by the plaintiffs is a fraud upon the public and contrary to public policy; The public was not represented at the hearing; the customers of the parties to the suit were not parties to the proceedings herein. As to them, there was no due process of law and the Court decree with regard to them was purely capricious and arbitrary; The decree and injunctional orders restrains parties not before the Court on the theory of 'representation,' which theory does not apply herein; The Court erroneously predicated its decree in part on the labor strife existing between the plaintiffs and the Journeymen Barbers International Union of America, Locals Nos. 548, 576 and 587, respectively; The decree discriminated in favor of barber schools and department stores; The plaintiffs have an adequate remedy at law.

punished for contempt of this court for their respective neglects and refusals to comply with the aforesaid decree of court and with of injunction issued pursuant thereto, a copy of which with or injunction the said appellants each admit having received about July 1, 1937.

"The said appellants, barber shop owners in Chicago, in answer to said petition said that they wilfully, deliberately and willfully violated the aforesaid writ and decree, admitted that they were charging 15¢ for a shave and 25¢ for an adult haircut, denied a conspiracy between themselves to force competitors to do likewise, etc., stated that they were compelled to maintain uniform for the purpose of protecting their business interests; that they would prefer charging 20¢ for shaves and 30¢ for adult haircuts but were compelled to charge lower prices by reason of unfair, unfair and destructive competition of others and that they are opposed to any destructive competition by a limited few that the matter has no jurisdiction of the subject matter of the petition; denied that the action of the court was contrary to the constitution of this state, of the United States and of the common law of this state and of this land; that the activities complained against were undertaken by plaintiffs are not illegal; that they believe in the American principle of absolute individualism; that in pursuance of said principle and under the system which has made possible the great development and progress of this country each man must rely on his own skill, ability and resources in dealing with his competitors; that said interfering system of standardization has been regarded since the formation of our country and is part of the recognized common law of the land and whether under cost selling is involved or not, is in this case immaterial, as competitors have the same right to conduct their businesses accordingly.

"On said August 27, 1937, said appellants moved the court (a) To vacate the decree of court herein entered on April 22, 1937; (b) In the event said motion to vacate said decree was denied that the permanent injunction herein be dissolved; (c) In the event said motion to dissolve said injunction was denied, that the decree of court be modified, alleging that: 'The Court lacked and lacks jurisdiction of the subject matter and all parties hereto; The by-laws of the plaintiff association are void and not binding upon those petitioners, in that among other things: (a) They provide for price fixing; (b) They violate Illinois law; (c) They prevent competition; (d) They are in violation of the Illinois statutes of Illinois prohibiting trusts, pools and combinations to regulate or fix the price of any article of merchandise or commodity; (e) They are contrary to public policy; (f) They are in violation of the common law of this state; (g) They are unreasonable; (h) They are unlawful; (i) They are unconscionable; (j) The respondents, and they cannot are not and were not members of the plaintiff association; the court did not have power to fix minimum prices; The plaintiffs did not state a cause of action that entitled them to a decree as was entered herein; the plaintiffs did not come into court with clean hands and should have been denied relief; the claims of the plaintiffs are a front and the public and contrary to public policy; the public was not represented at the hearing; the members of the petition in the suit were not parties in the proceeding herein. In no case, there was no [illegible] in the public interest; Court decree with regard to them was purely arbitrary; the decree and injunctional order violates rights not before the court on the theory of 'representation'; said theory does not apply herein; The Court erroneously predicated its decree in part on Labor strife existing between the plaintiffs and the journeymen barbers International Union of America, Local No. 548, AFL, and respectively; the decree discriminated in favor of barber schools and department stores; The plaintiffs have an adequate remedy at law.

"On August 29, 1935, Judge Peter H. Schwaba, them sitting in the above case, after hearing testimony and the argument of counsel, denied the petition of the appellants and entered an order among other things finding that the Court had jurisdiction of this cause and the parties hereto and further that said appellants failed and wilfully refused to comply with the aforesaid decree and writ of injunction in that said appellants are engaging in a conspiracy for the purpose of and with the effect of destroying, injuring and damaging their competitors and the plaintiffs herein, and with the effect of causing their competitors loss of customers and loss of wages to their employees; that they are singly and collectively engaging in destructive and ruinous trade practices and nefarious competition, etc., as will more fully appear from the order of Court appearing in the record; that said appellants have repeatedly expressed and shown their defiance of this court and the aforesaid decree and writ of injunction and that no sufficient cause is shown by them or any of them why they should not comply with the aforesaid decree and writ of injunction, but that although able so to do each wilfully fails and refuses to obey the same; that the said appellants are guilty of contempt of this court and that said contempt has tended to defeat and impair the rights and interests of the plaintiffs herein and to impede and embarrass and obstruct the court in its administration of justice and to bring the administration of justice into contempt, and ordered that said appellants be and they were fined the sum of $25 each, etc., to which order the appellants excepted and take this their appeal and have presented to the Court a supersedeas Bond with good surety."

The pertinent portions of the decree, which directed the issuance of the writ of injunction, are as follows:

"And the Court having heard counsel for the respective parties hereto, and being further advised in relation to the subject matter hereof and the respective rights and interests of all parties hereto, Does Find:

"That the Court has jurisdiction of the parties hereto and the subject matter hereof;

"***

"That:

"(a) No equitable conditions can prevail and an equilibrium cannot be maintained in the barber trade and industry in this city and its suburbs;

"(b) Certain unsocial and nefarious practices, in effect a public nuisance, cannot be stopped, prevented or precluded;

"(c) Certain destruction of property in this community and disintegration of business cannot be counteracted;

"(d) Certain wantonness and irresponsibility on the part of a certain part of our population, vitiating the public policy of the state does not lend itself to suppression or abatement;

"Unless the standard of fair trade practices for this trade and industry is abstracted, defined, interpreted and prescribed for them by a court of equity, and

"That this Court should equitably

"(a) Abstract, define and interpret certain unsocial and destructive conduct and nefarious practices for the large number of

"On August 29, 1932, Judge Luhr [illegible], [illegible] the above case, after hearing testimony and the argument of counsel, denied the petition of the appellants and entered an order among other things finding that the Court had jurisdiction of this cause and the parties hereto and further that said appellants failed and wrongfully refused to comply with the aforesaid decree and with the injunction in that said appellants are engaging in a conspiracy for the purpose of and with the effect of destroying, injuring and damaging their competitors and the plaintiffs herein, and with the effect of causing their competitors loss of business and injury to their employees; that they are simply and solely [illegible] engaging in false and fraudulent trade practices and malicious slander, etc., as will more fully appear from the order of Judge [illegible] in the record; that said appellants have repeatedly [illegible] and shown their failure of this court and the already lenient and [illegible] of injunction and that no satisfactory basis is shown by them or any of them why they should not comply with the injunction decree and writ of injunction, but have already [illegible] to do so in such wrongful [illegible] and further to show the court that the said appellants are guilty of contempt of this court and that said contempt has lasted [illegible] defeat and impair the rights and interests of the plaintiffs herein and to impede and obstruct and obstruct the court in its administration of justice and to bring the administration of justice into contempt, and defense that said appellants be and they were fined the sum of $[illegible] each, etc., to which order the appellants excepted and take this their appeal and have presented to the Court a supersedeas bond with good surety."

The pertinent portions of the decree, which directed the

[illegible] of the writ of injunction, are as follows:

"And the court being duly advised concerning the premises, finds herein, and being further advised in relation to the subject matter hereof and the respective rights and interests of all parties hereto, does find:

"That the Court has jurisdiction of the parties hereto and the subject matter hereof;

"***

"That:

"(a) No equitable consideration can prevail and an equitable remedy be maintained in the Lower Court and tribunal in this city and its environs;

"(b) Certain unsocial and nefarious practices, in effect a public nuisance, cannot be stopped, prevented or precluded;

"(c) Certain destruction of property in this community and disintegration of business cannot be counteracted;

"(d) Public weariness and irresponsibility on the part of a certain part of our legal [illegible], alienating the public [illegible] the right does not lend itself to suppression or abatement;

"Unless the standard of fair trade practice for this trade and industry is substituted, defined, interpreted and prescribed for them by a court of equity, and

"That this Court should equitably

"(a) Abstract, define and interpret certain unsocial and destructive economic and statistical practices for the lower courts of this city and its environs;

people here involved exerting an influence and a power as shown herein over vast properties, a great human endeavor and a service which is imbued with a public interest, and order them to refrain from such unsocial and destructive conduct and nefarious practices.

"(b) Effect a condition and establish a continuing influence which should and shall preclude and prevent certain wantonness and irresponsibility, certain unsocial and nefarious practices, certain destruction of property and disintegration of business, certain disturbances of public policy and certain other subversive forces.

"The following list of prices have been the normal prices for Chicago and its suburbs in the last 25 years: Shaving 25c; Haircutting, 50c; Haircutting - children under 12 years of age, 25c; Beard Trimming, 50c; Hair Singeing, 35c; Shampoo, plain, 50c; all oil, egg and Mange Cure Shampoos, 75c up; Face Massage, 50c up; Clay Massage, $1.00 up; Hair Tonic, 15c; Razors Honed, 50c up; Private or Sick Calls, shave or haircut, $1.00 each;

"These prices are but moderate and not excessive. ***

"That all parties made parties herein by name, except those named in section 2 hereof, as being in default, have stipulated and agreed in writing to be bound by the terms of this decree.

"It Is Therefore Ordered, Adjudged and Decreed: ***

"That upon good cause shown, an injunction issue in this cause as prayed for in said amended and supplemental complaint, without bond, permanently restraining said defendants as well as said plaintiffs, and each of them, and all associations, firms and persons assisting, aiding, confederating or conspiring with them or having knowledge of said injunction from:

"(a) Engaging in any conspiracy or combination or practices in the barber trade and business for the purpose or with the effect of destroying, injuring or damaging their competitors in the barber trade or business, or the plaintiffs herein, or for the purpose or with the effect of causing loss of members to said plaintiffs, or causing to competitors loss of customers, or loss of wages to competitors' employees, and from doing any acts in furtherance of such conspiracy, combination or practices.

"(b) Singly or collectively, engaging in destructive or ruinous trade practices or nefarious competition, for the purpose or with the effect of unsettling, destroying, degrading or disintegrating the barber profession or industry in Chicago and its suburbs.

"(c) Inaugurating, participating in, encouraging or maintaining a course of price cutting, for the purpose of or with the effect of compelling, or which would put in a position the plaintiffs or barber shop owners in the City of Chicago and its suburbs to operate at a loss or without reasonable profit in their barbering service, pursuits or undertakings.

"(d) Indulging in any insiduous practices or doing any vitiating act or thing singly or collectively, for the purpose of or with the effect of unfairly depriving plaintiffs, respectively of their patrons or employees, and for the purpose or with the effect of injuring the good will, business, or investment of plaintiffs, respectively.

"(e) Creating or maintaining a price war or reducing the charge or price for barbering service below the following prices: Shaving, 25c; Haircutting, 50c; Haircutting - children under 12

"(b) Effect a combination and establish a continuing in-
Finance which should and shall preclude and prevent certain monopo-
ness and irresponsibility, certain unnecessary and exorbitant practices,
certain destruction of property and disorganization of business,
certain disturbances of public peace and serious other adversive
forces.

"The following list of prices have been the normal prices
for Chicago and its environs in the last 25 years: Shaving 25¢;
haircutting 50¢; haircutting - children under 12 years of age, 25¢;
hair tinting, 50¢; hair dyeing, 75¢; shampoo, plain, 50¢; all
oil, egg and beer rinse shampoos, 75¢ up; face massage, 50¢ up;
clay massage, $1.00 up; Hair Tonic, 15¢; Manicure Nomad, 50¢ up;
trims or clipping, above or behind, $1.00 each;

"These prices are but moderate and not excessive. ***

"That all parties made parties herein by name, except those
named in section 2 hereof, as being in default, have entered and
agreed in writing to be bound by the terms of this decree.

"It is Therefore Ordered, Adjudged and Decreed: ***

"That upon proof being shown, as hereinafter issue in this
cause as proved for in said amended and supplemental complaint,
without bond, permanently restraining said defendants as well as
said plaintiffs, and each of them, and all associations, firms and
persons associated, acting, conspiring or participating with them or
having knowledge of said injunction from:

"(a) Engaging in any conspiracy or combination or practices
in the barber trade and business for the purpose or with the effect
of destroying, injuring or damaging their competitors in the barber
trade or business, or the plaintiff parties, or for the purpose or
with the effect of causing loss of members to said plaintiffs, or
causing to competitors loss of customers, or loss of wages to
competitors' employees, and from doing any acts in furtherance of
such conspiracy, combination or practices.

"(b) Singly or collectively, engaging in destructive or
ruinous trade practices or malicious competition, for the purpose or
with the effect of monopolizing, destroying, injuring or disparaging
the barber profession or industry in Chicago and its suburbs.

"(c) Inducing, participating in, encouraging or main-
taining a course of price cutting for the purpose or with the
effect of competition, or which could not in a position the plaintiffs
or barber shop owners in the city or Chicago and its suburbs to operate
at a loss or without reasonable profit in their respective service
provide or materialize.

"(d) Indulging in any malicious practices or doing any
vitiating act or thing simply or collectively, for the purpose of or
with the effect of unfairly depriving plaintiffs, respectively or their
partners or employees, and for the purpose or with the effect of injuring
the good will, business, or livelihood of plaintiffs, respectively.

"(e) Creating or maintaining a price war or promoting the
charge or price for barbering service below the following prices
barbering, 25¢; haircutting, 50¢; haircutting - children under 12

years of age, 25c; Beard Trimming, 50c; Hair Singeing, 35c; Shampoo, plain 50c; All oil, egg and Mange Cure Shampoos, 75c up; Face Massage, 50c up; Clay Massage, $1.00 up; Hair Tonic, 15c up; Razors honed, 50c up; Private or Sick Calls, shave or haircut, $1.00 each.

"An Exception Being Made:

"In the case of defendants operating barber shops located exclusively and entirely in and within department stores, because of their such isolation, to the extent of a difference of ten cents on adult haircuts and five cents on haircuts of children under 12 years of age.

"In the case of the 'barber school' defendants, to the extent of maintaining and charging prices as follows: Any suitable or no charge for work done by school students during the first three months of their training; a charge of not less than ten cents per shave and twenty-five cents per haircut during the fourth and fifth and sixth months of their training and until they qualify as apprentices; and a charge of not less than twenty-five cents per shave and fifty cents per hair cut by apprentice or journeymen barbers who attend classes to become more proficient in their work.

"(f) Inserting any announcement or advertisement in any newspaper, periodical, magazine, program or publication or in or upon any door, wall or window, and from distributing any hand bills, circulars or announcements and from issuing any letters or from communicating, orally or in writing, by radio or otherwise announcing prices for barbering services lower than the minimum prices found herein as conformable to and compatible with equitable conditions, which prices are set forth in Section (e) preceding.

"It Is Further Ordered, Adjudged and Decreed That:

"The plaintiffs shall re-employ the 639 journeymen barbers plaintiffs were compelled to lay off during the past several months by reason of the acts of the defendants complained of, as follows:

"39 men immediately upon the signing of this decree. Then 50 men or more per week until said entire 639 journeymen barbers shall have been reabsorbed by the plaintiffs' shops within a period of substantially 13 weeks from this date."

The decree pursuant to which the permanent injunction issued was entered April 15, 1935, and it became a final determination of the matters at issue in the cause since no appeal was taken therefrom. It will be noted that no attempt was made to question the validity of the decree or the permanent injunction until after the respondents were ruled to show cause on August 27, 1935, why they should not be held in contempt of court for violating the terms of said decree and injunction. As has been shown, the respondents admitted by their answer to the rule that they had violated the terms of the decree and the injunction but claimed that their disobedience of the writ of injunction is not punishable as contempt of court because the decree and the injunction

"An Exception Being Made:

"In the case of defendants operating barber shops located exclusively and entirely in and within dwelling places, because of their such isolation, to the extent of a difference of ten cents on adult haircuts and fifty cents on haircuts of children under 12 years of age.

"In the case of the 'barber school' defendants, to the extent of individualizing and charging prices as follows: Any available or no charge for work done by school students during the first three months of their training; a charge of not less than ten cents per shave and twenty-five cents per haircut during the fourth and fifth and sixth months of their training and until they qualify as apprentices; and a charge of not less than twenty-five cents per shave and fifty cents per hair cut by apprentice or journeyman barbers, who already claimed to become more proficient in their work.

"(2) Imposing any commitment or advertisement in any newspaper, periodical, magazine, program or publication or in or upon any door, wall or window, and from distributing any hand bills, circulars or announcements (or from issuing any letters or from communicating, orally or in writing, by radio or otherwise announcing prices for barbering services lower than the minimum prices found herein to conformable to and compatible with equitable conditions, which prices are set forth in section (4) preceding.

"It is Further Ordered, Adjudged and Decreed That:

"The plaintiff shall re-employ the 6,0 journeyman barber plaintiffs who qualified to try out during the past several months by reason of the acts of the defendants complained of, as follows:

"(1) Upon immediately upon the signing of this decree. Then 20 men or more per week until full entire 6,0 journeymen barbers shall have been restored by the plaintiffs; upon obtain a period of substantially 12 months from this date."

The decree pursuant to which the permanent injunction issued was entered April 13, 1938, and it became a final determination of the matters at issue in the case since no appeal was taken therefrom. It will be noted that no attempt was made to question the validity of the decree or the permanent injunction until after the respondents were ruled to show cause on August 27, 1939, why they should not be held in contempt of court for violating the terms of said decree and injunction. As has been shown, the respondents admitted by their answer to the rule that they had violated the terms of the decree and the injunction but claimed that their disobedience of the writ of injunction is not punishable as contempt of court because the decree and the injunction

were void in that the court had no jurisdiction of the subject matter involved. In their written motion to vacate the decree or in the alternative to dissolve or modify the injunction, the respondents asserted that the chancellor lacked jurisdiction of the subject matter because the decree pursuant to which the writ of injunction issued was null and void as in violation of the Criminal Statute of Illinois, the common law, and contrary to public policy and the Constitution of the State of Illinois and of the United States.

It has been held repeatedly that in proceedings for contempt in failing to obey an order of court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void. He cannot be heard to say that it was merely erroneous, however flagrant it may appear to be. In Court Rose No. 12 F. A. v. Corna, 279 Ill. 605, the court said at pp. 607, 608:

"Where an injunction, order, mandate or decree of a court has been disobeyed or disregarded and there is a proceeding for contempt of the court for such disobedience or disregard, the only question to be considered is whether the court had jurisdiction to make the order or decree. Jurisdiction is the power to hear and determine a matter in controversy, and if the power existed, the question whether the court erred or the power was improperly exercised is not involved and errors of the court constitute no defense whatever. An injunction void because of want of jurisdiction in the judge who ordered it may be disregarded and the person disregarding it is not guilty of contempt, (People v. McKeeney, 259 Ill. 161; Ann. Cas. 1916B, 34;) but a party enjoined cannot refuse to obey the injunction upon the ground that it is erroneous or improvidently granted. If the bill upon which an injunction is granted is defective, it must be tested by demurrer in court and not by disobedience to the writ. The jurisdiction of a court of equity does not depend upon the correctness of the decision made, but an order made in the exercise of jurisdiction must be obeyed until the order is modified or set aside by the court making it or reversed in a direct proceeding by appeal or on error. (Leopold v. People, 140 Ill. 552; Clark v. Burke, 163 id. 334; People v. Weigley, 155 id. 491; O'Brien v. People, 216 id. 354; Franklin Union v. People, 220 id. 355; Christian Hospital v. People, 223 id. 244.) The power of the courts to enforce their orders and judgments is a necessary incident to the administration of justice, and if they were without power to compel obedience or to prevent unwarranted interference with the administration of justice they could not perform their functions or secure the rights of litigants, however important."

Therefore, the only question presented for our determination is whether the Superior court had jurisdiction to enter the decree. The respondents contend that the decree violates certain provisions

were void in that the court had no jurisdiction of the subject matter involved. In their written motion to vacate the decree or in the alternative to dissolve or modify the injunction, the respondents asserted that the chancellor lacked jurisdiction of the subject matter because the decree pursuant to which the writ of injunction issued was null and void as in violation of the Criminal Statute of Illinois, the common law, and contrary to public policy and the Constitution of the State of Illinois and of the United States.

It has been held repeatedly that in proceedings for contempt in failing to obey an order of court, the respondent may question the order which he is charged with violating is obey only in so far as he can show it to be absolutely void. He cannot be heard to say that it was merely erroneous, however flagrant it may appear to be. In Cooper Bros. No. 12 v. v. Cooper, 279 Ill. 595, the court said at pp. 597, 598:

"Where an injunction, order, mandate or decree of a court has been disobeyed or disregarded and there is a proceeding for contempt of the court for such disobedience or disregard, the only question to be considered is whether the court had jurisdiction to make the order or decree. Jurisdiction is the power to hear and determine a matter in controversy, and if the power existed, the question whether the court erred or the power was improperly exercised is not involved and errors of the court constitute no defense whatever. An injunction void because of want of jurisdiction in the judge who issued it may be disregarded and the person disregarding it is not guilty of contempt. (People v. Ill. Bank, 237 Ill. 149; Am. Cas. 1912B, 24;) but a party enjoined cannot refuse to obey the injunction upon the ground that it is erroneous or improvidently granted. If he will not obey an injunction it granted is doubtful, it must be tested by immediate in court and not by disobedience in the end. The jurisdiction of a court of equity does not depend upon the correctness of the decision made, but an order made in the exercise of jurisdiction must be obeyed until the order is modified or set aside by the court making it or reversed in a direct proceeding by appeal or on error. (Lewis v. People, 140 Ill. 797; Black v. Lewis, 140 Ill. 134; Ewell v. Daggs, 108 U.S. 143; Chicago v. Sheldon, 133 Ill. 43; Chicago v. Jones, 148 Ill. 332; Hamilton Gas Co. v. Hamilton, 146 Ill. 267; Chicago Municipal v. Ashton, 193 Ill. 244.) The power of the courts to enforce their orders and judgments is a necessary incident to the administration of justice, and if they are without power to compel obedience or to prevent encroachments interference with the administration of justice they could not perform their functions or secure the rights of litigants, however important."

Therefore, the only question presented for our determination is whether the Superior court had jurisdiction to enter the decree. The respondents contend that the decree violates certain provisions

of the Constitution of the State and the United States. This contention cannot be urged in this court. When matters involving a construction of the Constitution are relied upon by an appellant, the appeal should be direct to the Supreme court, and where an appeal is perfected to this court, such questions are waived. (American Cigar Co. v. Berger, 221 Ill. App. 285.) In passing upon this question in People v. Terrill, 362 Ill. 62, the court said at p. 62:

"This court [~~appellate court~~] is obviously without jurisdiction to consider any constitutional questions in the proceeding. The Practice Act requires that all cases in which constitutional questions are raised must be taken directly to the Supreme Court by appeal or writ of error. We have repeatedly held that if such a case is taken to the Appellate Court and errors are assigned of which that court has jurisdiction, the party taking the appeal or suing out the writ of error is held to have waived the constitutional questions."

It is next contended that the decree is void because the court lacked jurisdiction of the subject matter in that the order for the injunction was based upon the by-laws of the plaintiff association which "are in violation of the Criminal Statute of Illinois prohibiting trusts, pools and combinations to regulate or fix prices of any articles of merchandise or commodities." The same contention under an almost identical factual situation was made in Chicago Laundry Owners Association v. American Wet Wash Laundry, Inc., 276 Ill. App. 604 (abstract opinion). In that case, where wet wash laundry service rather than barber service was involved, we think the court in its opinion written by Mr. Justice McSurely completely answered the instant contention. It was there said:

"The criminal statute of Illinois with which it is said the by-laws are in conflict, chap. 38, pars. 598-605 (Cahill) 1933, in substance makes illegal any agreement between corporations and others to fix the price 'of any article of merchandise or commodity.' This statute does not apply to laundry service for at least two reasons: (1) merely washing articles is not furnishing an article of merchandise or a commodity. We are in accord with the statement in State ex rel. v. Frank, 114 Ark. 47, where a statute similar to ours was involved, where the court said:

"'The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the Legislature of this State has not made such an agreement unlawful.'

of the Constitution of the State and the United States. This contention cannot be urged in this court. When matters involving a construction of the Constitution are relied upon by an appellant, the appeal should be direct to the supreme court, and where an appeal is perfected to this court, such questions are waived. (Harlem Glass Co. v. Brown, 221 Ill. App. 589.) In passing upon this question in People v. Terrill, 362 Ill. 62, the court said at p. 62:

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It is next contended that the decree is void because the court lacked jurisdiction of the subject matter in that the order for the injunction was based upon the by-laws of the plaintiff association which "are in violation of the criminal statute of Illinois prohibiting trusts, pools and combinations to regulate or fix prices of any articles of merchandise or commodities." The case contained only a short initial factual situation was made in Chicago Trades Association v. Quinlan and Bart Laundry, Inc., 274 Ill. App. 444 (abstract opinion). In that case, where set such friendly service rather than better service was involved, we stated the court in its opinion written by Mr. Justice McSurely analyzed the instant contention. It was there said:

"The criminal statute of Illinois with which it is said the by-laws are in conflict, also, Ill. Rev. Stat. (1921) 1911, in relevant sense limited any agreement between competitors and others to fix the price, or any limits of contracting or commodity. This statute does not apply to laundry service for at least two reasons: (1) merely washing articles is not fixing the price of merchandise or a commodity. We are in accord with the statement in Ohio ex rel. v. Hogan, 115 Ohio, 17, that a similar statute in ours was involved, where the court said:

"'The business of laundering is a mere service fee, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in the last analysis merely an agreement to fix the price of labor, or services, and the legislature of this state has not made such an agreement unlawful.'

"In State v. McLellan, 155 La. 38, it was held that the laundry business was not trade or commerce. See also United States v. Fur Dressers' & Fur Dyers' Assn, 5 Fed. (2d) 869. And in State v. Duluth Board of Trade, 107 Minn. 506, where the court was considering the charges whether an agreement to make uniform charges for the services of the Board of Trade in making sales violated the anti-trust statutes of the state, it was said:

"'Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the Federal anti-trust law * * * that combinations and agreements, the sole and only purpose of which is to fix the charges that shall be made for personal services, are not within the prohibitions of the statute.'

"Defendants cite Buckelew v. Martens, 108 N. J. L. 339, as holding that laundry service is a commodity. Reading the opinion indicates that the court did not consider this question but merely left to the jury whether it was the intention of the parties to control prices to the detriment of the public, and if it was it was illegal and if it was not it was legal. (2) The statute is concerned with preventing monopolies. Plaintiffs' complaint charges that thousands of low priced washing machines are constantly sold and used by the public and that it is impossible for laundries to monopolize wet washing because every family can do its own wet washing. Wet washing is simply washing articles without drying or ironing. The Illinois statute and decisions of our courts against price fixing are directed against monopolies in fact. Agreements as to price fixing or against below-cost selling without an intention to establish a monopoly are not condemned. Plaintiffs argue that the by-laws of its association were not intended to, nor did they in fact tend to, create a monopoly against the public."

It is then contended that the court was without jurisdiction to enter the decree because the by-laws of plaintiff-Association upon which the decree is predicated "are in violation of the common law of this State." As was said in the Chicago Laundry Owners Association case, "The decisions of our courts against price fixing are directed against monopolies in fact" and "agreements as to price fixing or against below-cost selling without an intention to establish a monopoly are not condemned." If an injunction is issued which does violate principles of the common law, the remedy of the parties enjoined is not to disobey the injunction. One may refuse to obey an injunction order only where it is absolutely void for want of power in the court to enter it, but he cannot refuse to obey it on the ground that it was improvidently or erroneously entered or that the power was improperly exercised, either because it violates principles of the common law or for any other reason. (American Cigar Company v. Berger, supra.)

"In State v. Schlitz, 215 La. 1, 39 So. 2d 1, we held that the liberty guarantee was not violate or concerned. We also quoted dicta from the opinion of our court in State v. Ice, 3 Ind. (2d) 267. And in State v. Duluth Board of Trade, 114 Minn. 164, where the court was considering the charge of the board of trade in making rules regulating the private affairs of the board of trade in making rules regulating the private affairs of the board of trade, it was said:

"Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conducts which are in themselves illegal that they come within the purview of the Federal anti-trust law * * * that combinations and agreements, the sole and only purpose of which is to fix the charges that shall be made for personal services, are not within the prohibitions of the anti-trust.'

"Petitioners cite Tumey v. Ohio, 273 U. S. 510, as holding that industry service is a commodity. Reading the opinion indicates that the court did not decide this question but merely left to the jury whether it was the intention of the parties in dealing with price to use detriment or the public, and if it was it was illegal and if it was not it was legal. (2) The statute is concerned with preventing monopolies. Plaintiffs' complaint charges that those acts of the police wrongly restrains and unnecessarily acts and used by the public and that it is impossible for laundries to compete with wet washing because every facility can do like one wet washing. Not washing is simply washing articles without drying or ironing. The Illinois statutes and decisions of our courts against price fixing are directed against monopolies in fact. Agreements as to price fixing or against below-cost selling without an intention to establish a monopoly are not condemned. Plaintiff's argue that the by-laws of its association were not intended to, nor did they in fact tend to, create a monopoly against the public."

It is then contended that the court was without jurisdiction to enter the decree because the by-laws of plaintiff-association upon which the decree is predicated "are in violation of the common law of this State." As was said in the Chicago Laundry Owners Association case, "The decisions of our courts against price fixing are directed against monopolies in fact" and "agreements as to price fixing or against below-cost selling without an intention to establish a monopoly are not condemned." If an injunction is issued which does violate principles of the common law, the remedy of the parties enjoined is not to disobey the injunction. One may refuse to obey an injunction order only where it is absolutely void for want of power in the court to enter it, but he cannot refuse to obey it on the ground that it was improvidently or erroneously issued or that the power was improperly exercised, either because it violates principles of the common law or for any other reason. (Chicago Flour Company v. Barber, supra.)

There has been no showing made of any common law principle violated by the decree that deprived the court of jurisdiction to enter it.

Since it has been repeatedly held that the public policy of the state must be determined by its constitution, legislative enactments and judicial decisions, what has already been said, in so far as the jurisdiction of the court is concerned, disposes of respondent's contention that the entry of the decree and the issuance of the injunction in this case were contrary to public policy.

The whole question of fairness in trade, including the question of unfair competition, is purely within the province of equitable jurisdiction (Hopkins on Trade Marks, Trade Names and Unfair Competition, 4th Ed., Sec. 22, p. 51), and we are constrained to hold that the Superior court had jurisdiction of the subject matter of this cause under its general chancery power. The question of jurisdiction being the only question properly before this court on this appeal, the order of the Superior court of August 29, 1935, is for the reasons stated herein affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

There has been no showing made of any common law principle violated by the force that deprived the court of jurisdiction to enter it.

Since it has been repeatedly held that the public policy of this state may be determined by its constitution, legislative enactments and judicial decisions, what has already been said, in so far as the jurisdiction of the court is concerned, disposes of respondent's contention that the entry of the decree and the issuance of the injunction in this case were contrary to public policy.

The whole question of fairness in trade, including the question of unfair competition, is purely within the province of equitable jurisdiction (Spector on trade names, trade marks and unfair competition, 69 N.J. Eq. 73, 74, 75) and we are constrained to hold that the decrees entered in the exercise of the judicial action of this nature under its general equitable power. The questions of jurisdiction being the only question properly before this court on this appeal, the order of the Superior Court of August 19, 1949, is for the reasons stated herein affirmed.

NO DISSENTING.

Frund and Donelson, JJ., concur.

39307

GEORGE E. MORING,
Appellee,

v.

THE PEELLE COMPANY, a
New York corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, The Peelle Company, seeks to reverse a judgment for $6,807.30 entered against it upon the verdict of a jury in an action brought by plaintiff, George E. Moring, to recover an alleged balance of commissions claimed to be due under the terms of a written contract. Defendant was engaged in the business of manufacturing and installing freight elevator doors and accessories and its home office was in New York city. Plaintiff represented The Peelle Company as its district manager at Chicago during the years 1930-1933. Defendant's motions for a directed verdict made at the close of plaintiff's case and again at the close of all the evidence were denied.

The complaint alleged that the contract between the parties was executed May 1, 1930; that plaintiff duly performed his part of the agreement, executing numerous contracts for the sale of defendant's products both within and without his allotted territory, and supervising the installation thereof within his territory, for which he was entitled to receive certain specified commissions; that contrary to the provisions of the aforesaid contract, defendant failed and refused to pay him the full commissions he claimed to be due him on seventeen transactions involving sales of defendant's products for installation in buildings both within and without the territory under his jurisdiction; and that defendant paid him only a portion of the amount due him on these seventeen transactions

30,307

GEORGE E. MORING,
Appellee,

v.

THE PEELLE COMPANY, a
New York corporation,
Appellant.

) APPEAL FROM MUNICIPAL COURT,

COOK COUNTY.

304 I.A. 2752

MR. PRESIDING JUSTICE MCGURN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, The Peelle Company, seeks to reverse a judgment for $6,807.30 entered against it upon the verdict of a jury in an action brought by plaintiff, George E. Moring, to recover an alleged balance of commissions claimed to be due under the terms of a written contract. Defendant was engaged in the business of manufacturing and installing freight elevator doors and accessories and its home office was in New York city. Plaintiff represented The Peelle Company as its district manager at Chicago during the years 1930-1933. Defendant's motions for a directed verdict made at the close of plaintiff's case and again at the close of all the evidence were denied.

The complaint alleged that the contract between the parties was executed July 1, 1930; that plaintiff duly performed his part of the agreement, soliciting numerous contracts for the sale of defendant's products both within and without his allotted territory, and supervising the installation thereof within his territory, for which he was entitled to receive certain specified commissions; that contrary to the provisions of the aforesaid contract, defendant failed and refused to pay him the full commissions he claimed to be due him on seventeen transactions involving sales of defendant's products for installation in buildings both within and without the territory under his jurisdiction; and that defendant paid him only a portion of the amount due him on these seventeen transactions

and there was a balance due of $5,643.65, together with interest thereon.

The seventeen transactions in question, including the name and location of the purchaser, the approximate date of the sales contract, the purchase price of defendant's products in each instance, the commission alleged to have been earned, the commission actually paid and the balance claimed to be due on each are shown in the following tabulation:

Purchaser	Approx. Date	Total Purchase	5% Commission earned	Comm. Paid.	Balance Due
American Can Co. Englewood, Ill.	May 19, 1930	$ 95,156.00	$4,757.80	$2,500.00	$2,257.80
U.S. Post Office, South Bend, Ind.	Sept.8, 1931	3,097.00	154.85	129.00	25.85
Continental Can Co., Houston, Tex.	July 27, 1933	1,215.00	60.75	50.00	10.75
U.S. Post Office, New York, N.Y.	Dec. 16, 1931	15,250.00	762.50	420.00	342.50
U.S. Post Office, Davenport, Iowa	May 13, 1932	1,875.00	93.75	46.88	46.87
Christian Science Pub. Co. Boston, Mass.	July 29, 1932	3,270.00	163.50	73.50	90.00
W.Mich. Dock & Whse Co. Muskegon, Mich.	Aug. 7,	1,652.00	82.60	.....	82.60
Continental Can Co., Seattle, Wash.	Aug. 9, 1933	1,925.00	96.25	39.00	57.25
Detroit Edison Co., Detroit, Mich.	Aug. 7, 1933	1,825.00	91.25	25.00	66.25
Continental Can Co., San Jose, Calif.	Aug. 23, 1933	3,313.00	165.65	75.00	90.65
			10% Commission		
Hiram Walker & Sons. Peoria, Ill.	Nov.21, 1933	14,356.40	1,435,64	662.50	773.14
U. S. Appraisers Stores Chicago, Ill.	Sept. 29, 1932	17,500.00	1,750.00	600.00	1,150.00

and there was a balance due of $9,643.69, together with interest thereon.

The seventeen transactions in question, including the name and location of the purchaser, the approximate date of the sales contract, the purchase price of defendant's products in each instance, the commission alleged to have been earned, the commission actually paid and the balance claimed to be due on each are shown in the following tabulation:

Purchaser	Approx. Date	Total Purchase	% Commission earned	Comm. Paid.	Balance due
American Gun Co. Englewood, Ill.	May 19, 1930	$ 95,156.00	$4,757.80	$2,500.00	$2,257.80
U.S. Navy Office, Bureau Ord., Wash.	1932	3,097.00	154.85	100.00	54.85
Continental Gun Co., Houston, Tex.	July 27, 1933	1,215.00	60.75	30.00	30.75
U.S. Post Office, New York, N.Y.	Jan. 14, 1932	15,250.00	762.50	500.00	262.50
U.S. Navy Office, Davenport, Iowa	May 11, 1932	1,372.00	71.75	25.00	46.87
Christian Science Pub. Co. Boston, Mass.	July 29, 1932	3,270.00	163.50	73.50	90.00
E.Ill. Dock & Tool Co. Kankakee, Ill.	Aug. 7,	1,[illegible]	82.00	.....	82.00
Continental Gun Co., Seattle, Wash.	Aug. 9, 1933	1,[illegible]	94.25	24.00	70.25
Detroit Union Co., Detroit, Mich.	Aug. 7, 1933	1,375.00	71.25	25.00	46.25
Continental Gun Co., San Jose, Calif.	Dec. 21, 1933	3,313.00	165.65	75.00	90.65
		Jan. Installments			
Allen Palmer & Sons, Phoenix, Ill.	Nov. 21, 1932	14,156.40	1,415.64	642.50	773.14
U.S. Internal Rev. Store Chicago, Ill.	1932	17,500.00	1,750.00	500.00	1,250.00

Firestone Tire & Rubber Co., Chicago, Ill.	Oct. 19, 1931	$ 1,071.00	$ 107.10	$ 25.00	$ 82.10
W.T.Raleigh Co., Freeport, Ill.	Nov. 24, 1931	4,800.00	480.00	283.00	197.00
American Can Co., Clybourn Ave.,Chicago,Ill.	Sept. 2, 1930	4,300.00	430.00	300.00	130.00
U.S.Post Office, Mason City,Iowa	June 27, 1931	2,961.72	296.17	222.13	74.04
Western Electric Co.,Chicago,Ill.	Sept. 21, 1931	6,635.00	663.50	335.00	328.50
	Total	$176,969.12	11,429.66	5,786.01	5,643.65

(By the verdict of the jury and the judgment entered thereon plaintiff was allowed the full amount claimed with interest thereon as to each of the transactions above enumerated.)

Defendant's answer admitted the execution of the contract wherein and whereby plaintiff was appointed its district manager to execute contracts for the sale of its products and to supervise the installation thereof within his own territory and that said contract was in effect from the date of its execution until 1933, but denied that it had breached any of its provisions or that it is indebted to the plaintiff in any sum whatsoever.

As additional defenses defendant's answer alleged that the contract contained the following among other provisions: "The manufacturer reserves the right to make an equitable division of commissions on sales where an outside office has been influential in closing the sale, and vice versa, and to make an equitable award on contracts closed at reduced prices;" that as to the purchase orders involved in all of the transactions set forth in the complaint defendant was compelled by reason of the then existing economic conditions to accept them at less than its existing list prices and that, therefore, by reason of the foregoing provision of the contract defendant "was entitled to and did make an equitable award of commissions on such sales to plaintiff and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled, and he accepted the same in full payment and satisfaction;"

Firestone Tire & Rubber Co., Chicago, Ill.	Oct. 19, 1932	$ 5,971.20	$ 147.12	$ 29.00	$5,30
E.V.Hadley Co., Freeport, Ill.	Nov. 24, 1932	4,000.00	480.00	283.00	197.00
American Can Co., Clybourn Ave., Chicago, Ill.	Sept. 2, 1930	4,300.00	430.00	300.00	130.00
U.S. Post Office, Twin City, Iowa	June 27, 1932	2,921.72	292.17	300.13	7[illegible]
Harbers Electric Co., Chicago, Ill.	Sept. 13, 1932	6,612.00	661.20	300.00	[illegible]
Total		$17,[illegible].12	$1,[illegible].00	$1,[illegible].01	$[illegible]

(By the verdict of the jury and the judgment entered thereon plaintiff was allowed the full amount claimed save interest thereon as to each of the transactions above enumerated.)

Defendant's answer admitted the execution of the contract sued on and whereby plaintiff was appointed its district manager to procure contracts for the sale of its products and to supervise the installation thereof within his own territory and that said contract was in effect from the date of its execution until 1931, but denied that it had breached any of its provisions or that it is indebted to the plaintiff in any sum whatsoever.

As additional defenses defendant's answer alleged that the contract contained the following among other provisions: "The manufacturer reserves the right to make an equitable division of commissions on sales where an outside office has been influential in closing the sale, and vice versa, and to make an equitable award on contracts closed at reduced prices." That as in the purchase orders involved in all of the transactions set forth in the complaint defendant was compelled by reason of the then existing economic conditions to accept them at less than its existing list prices and that, therefore, by reason of the foregoing provision of the contract defendant "was entitled to and did make an equitable award of commissions on such sales to plaintiff and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled, and he accepted the same in full payment and satisfaction."

that with respect to seven of the transactions set forth in the complaint, defendant accepted the contracts at prices below its existing list prices in order to keep its plant in operation, and that by reason of the above quoted provision of the contract between the parties defendant "was entitled to and did make an equitable division of commissions on such transactions, and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled, and he accepted the same in full payment and satisfaction;" that with respect to eleven of the transactions set forth in the complaint "these contracts were negotiated and closed independently and without the assistance of the plaintiff" and that by reason of the foregoing provision of the contract defendant "was entitled to and did make an equitable division and award of commissions on such transactions, and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled and he accepted same in full payment and satisfaction;" that with respect to the purchase orders in five of the transactions set forth in the complaint "the assistance, effort and influence of representatives of the defendant, other than plaintiff, and in addition to the plaintiff, were realized and enjoyed by the defendant," and that, therefore, by reason of the aforesaid provision of the contract defendant "was entitled to and did make an equitable division of commissions on such transactions and in all of such transactions plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled and he accepted the same in full payment and satisfaction;" and "that prior to the commencement of this action and in accordance with settlements theretofore made which were entered into between the plaintiff and the defendant with full knowledge of the facts, the defendant paid to the plaintiff and the plaintiff received and accepted from the defendant *** $5,978.53 in full satisfaction of the claims alleged in the complaint herein."

Plaintiff's reply joined issue by denying all of the allegations

that with respect to seven of the transactions set forth in the complaint, defendant accepted the contracts at prices below its existing list prices in order to keep its plant in operation, and that by reason of the above quoted provisions of the contracts between the plaintiff defendant "was entitled to and did make an equitable division of commissions on such transactions, and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled, and he accepted the same in full payment and satisfaction;" that with respect to eleven of the transactions set forth in the complaint "these contracts were negotiated and closed independently and without the assistance of the plaintiff" and that by reason of the foregoing provision of the contract defendant "was entitled to and did make an equitable division and award of commissions on such transactions, and in all of such transactions the plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled and he accepted same in full payment and satisfaction;" that with respect to the purchase orders in five of the transactions set forth in the complaint "the assistance, effort and influence of representatives of the defendant, other than plaintiff, and in addition to the plaintiff, were required and employed by the defendant," and that, therefore, by reason of the aforesaid provision of the contract defendant "was entitled to and did make an equitable division of commissions on such transactions and in all of such transactions plaintiff received from the defendant all of the commissions to which he was in any way equitably or legally entitled and he accepted the same in full payment and satisfaction;" and "that prior to the commencement of this action and in accordance with settlements theretofore made which were entered into between the plaintiff and the defendant with full knowledge of the facts, the defendant paid to the plaintiff and the plaintiff received and accepted from the defendant *** $5,978.53 in full satisfaction of the claims alleged in the complaint herein."

Plaintiff's reply takes issue by denying all of the allegations

as to the foregoing defenses.

The contract between the parties upon which this action is predicated is as follows:

"May 1, 1930.

The Peelle Company, a New York State Corporation; having its principal office at 47 Stewart Avenue, Brooklyn, N. Y., hereinafter called the manufacturer, and George E. Moring, of Chicago, Ill., hereinafter called District Manager, mutually agree to the following terms of contract, covering the sale of Peelle Products.

Article 1.

(a) The District Manager shall execute, and supervise the sale of the manufacturer's products in the following territory:

States of, North Dakota, South Dakota, Nebraska, Iowa, Minnesota, Wisconsin, Illinois excepting East St. Louis and suburbs. In Indiana, the counties of Lake, Porter, La Porte, St. Joseph, Elkhart, La Grange, Steuben, Noble, DeKalb, and Allen; Michigan, West of Straits of Mackinac; Kansas and Colorado, and Missouri.

(b) The manufacturer shall maintain a branch office in Chicago, Illinois, at its own expense.

(c) The manufacturer shall furnish the District Manager with price lists, and the District Manager shall quote, and accept contracts, in the name of the manufacturer.

Copies of all estimate sheets, and proposals, shall be sent to the manufacturer.

Contracts closed, or lost, shall be reported to the manufacturer at once.

Article II.

The manufacturer shall bill, and collect, all contracts.

Article III.

The District Manager shall receive commissions as follows:

10% on sales opened and closed for products installed in buildings located within the territory.

5% on sales closed for products installed in buildings located outside the territory.

5% on sales closed by others outside the territory, for products installed in buildings located within the territory.

One-half commission on sales made through subagents.

Full commission on sales, in open territory, that are assigned to the District Manager for closing.

The Manufacturer reserves the right, to make an equitable division of commissions on sales where an outside office has been

as to the foregoing matters.

The contract between the parties upon which this action is predicated is as follows:

"May 1, 1920.

The Pexlle Company, a New York State Corporation, having its principal office at 47 Everett Avenue, Brooklyn, N. Y., hereinafter called the manufacturer, and George E. Young, of Chicago, Ill., hereinafter called the District Manager, mutually agree to the following terms of contract, covering the sale of Pexlle products.

Article I.

(a) The District Manager shall exercise, and supervise the sale of the manufacturer's products in the following territory:

States of, North Dakota, South Dakota, Nebraska, Iowa, Minnesota, Wisconsin, Illinois excepting East St. Louis and suburbs, in Indiana, the counties of Lake, Porter, La Porte, St. Joseph, Elkhart, in Ohio, Steuben, Noble, DeKalb, and Allen; Michigan, that of Straits of Mackinac, Kansas and Colorado, and Missouri.

(b) The manufacturer shall maintain a branch office in Chicago, Illinois, at its own expense.

(c) The manufacturer shall furnish the District Manager with price lists, and the District Manager shall write, and accept contracts, in the name of the manufacturer.

Copies of all estimate sheets, and proposals, shall be sent to the manufacturer.

Contracts closed, or lost, shall be reported to the manufacturer at once.

Article II.

The manufacturer shall bill, and collect, all contracts.

Article III.

The District Manager shall receive commissions as follows:

10% on sales opened and closed for products installed in buildings located within the territory.

7% on sales closed for products installed in buildings located outside the territory.

7% on sales closed by others outside the territory, for products installed in buildings located within the territory.

One-half commission on sales made through subagents.

Full commission on sales, in open territory, that are assigned to the District Manager for closing.

The manufacturer reserves the right, in case an equitable division of commissions on sales shall an orderly or [illegible]

influential in closing the sale, and vice versa, and to make an equitable award on contracts closed at reduced prices.

Article IV.

The selling prices of products to National users shall be determined by the manufacturer before quoting, and commissions awarded at the time the sale is made, and will vary as conditions demand. [The only purchasers involved here who were classed as "National users" were the American Can Company and Continental Can Company.]

Commissions become due as collections are made.

The manufacturer shall pay the District Manager a drawing account not exceeding the accrued commissions on sales.

Article V.

This contract may be terminated by either party on sixty (60) days written notice.

Article VI.

The agent agrees to faithfully present the manufacturer's Products to prospective users and diligently follow all leads for business in this territory.

THE PEELLE CO.
By (Signed) C. W. Peelle, Pres.
Date May 1, 1930.

(Signed) Geo. E. Moring,
Date May 1, 1930." (Italics ours.)

Defendant's contentions as stated in its brief are that with "respect to each and every transaction involved in this case there was an accord and satisfaction between the parties, the evidence concerning which stands undisputed, and that therefore the plaintiff is entitled to recover nothing; *** that all of the sales of its products involved herein were made at prices below its standard list price in effect at the time the saleswere made, and that therefore under the provisions of Article III of the agreement it was authorized to make an equitable award of commissions on such transactions, which would necessarily be less than the stated percentages set forth in Article III; that because of such reduced prices below its standard list price it did in good faith make equitable awards of commissions to the plaintiff, and that the plaintiff accepted these equitable awards at less than the stated percentages, in full payment and satisfaction. The defendant further contends that with respect to some of these transactions, services leading up to the sales were rendered by

Individual in charge the sale, and vice versa, and to make an equitable award on equitable closed at reduced prices.

Article IV.

The selling price of products to Retailers may still be determined by the manufacturer before selling, the commission earned at the time the sale is made, and will stay at that amount. (The only procedure involved here is the wording "Retailers never" were the Retailer can compute and continued Can Company.)

Commissions become due as collections are made.

The manufacturer shall pay the District Manager a monthly account for assembling the accrued commissions on sales.

Article V.

This contract may be terminated by either party on sixty (60) days written notice.

Article VI.

The agent agrees to faithfully present the manufacturer's products to prospective users and diligently follow all leads for business in this territory.

Sun Fruits Co.
By (signed) C. L. Ruffin, Pres.
Date May 1, 1930.

(signed) Geo. H. Moring.
Date May 1, 1930." (Italics ours.)

Defendant's contentions as stated in its brief are that with "respect to each and every transaction involved in this case there was an accord and satisfaction between the parties, the evidence concerning which stands undisputed, and that therefore the plaintiff is entitled to recover nothing; *** that all of the sales of its products involved herein were made at prices below its standard list price in effect at the time the sales were made, and that therefore under the provisions of Article III of the agreement it was authorized to make an equitable award of commissions on such transactions, which would necessarily be less than the stated percentages set forth in Article III; that because of such reduced prices below its standard list price it did in good faith make equitable awards of commissions to the plaintiff, and that the plaintiff accepted those equitable awards at less than the stated percentages, in full payment and satisfaction."

The defendant further contends that with respect to some of these transactions, services leading up to the sales were rendered by

members of its organization other than the plaintiff and that under Article III of the agency agreement it was authorized to and did in good faith make a division of commissions on that account and that the plaintiff in those cases was paid and accepted a commission which was less than the stated percentages set forth in Article III and that he accepted the same in full satisfaction of his claimed commissions on those sales; that with respect to sales of the defendant's products to concerns who were National users, it was provided in Article IV that commissions in those cases would vary as conditions demand, and that the plaintiff was in good faith paid commissions on such sale accordingly, which were less than the stated percentages set forth in Article III of the agreement and that he received and accepted the same in full satisfaction."

Plaintiff's theory is that he was entitled to receive commissions on the transactions involved in this proceeding at the stated percentages set forth in Article III of the contract, regardless of the prices at which the sales were made or of any other alleged reservation contained in the contract, and that, inasmuch as he was not paid such percentages on these sales, he is entitled to recover from defendant the difference between what was paid him and the amount he should have received in accordance with the percentages stated in said Article III.

For a clearer understanding and proper consideration of the questions presented it is necessary to set forth somewhat fully the relevant and salient facts and circumstances. The evidence as to the facts hereinafter set forth was undisputed.

AMERICAN CAN COMPANY,
CHICAGO, ILLINOIS.

This contract which was entered into between the American Can Company and the Peelle Company in New York, required the installation of defendant's equipment in the plant being erected by said American Can Company at Chicago (Englewood), Illinois. The contract price was $95,090. Inasmuch as this contract came within the classification "closed by others outside the territory for products installed in buildings located within the territory," plaintiff claims that under

members of its organization other than the plaintiff and that under Article III of the agency agreement it was authorized to and did in good faith make a division of commissions on that account and that the plaintiff in those cases was paid and accepted a commission which was less than the stated percentages set forth in Article III and that he accepted the same in full satisfaction of his claimed commissions on those sales; that with respect to sales of the defendant's products to concerns who were National users, it was provided in Article IV that commissions in those cases would vary as conditions demand, and that the plaintiff was in good faith paid commissions on such sale accordingly, which were less than the stated percentages set forth in Article III of the agreement and that he received and accepted the same in full satisfaction."

Plaintiff's theory is that he was entitled to receive commissions on the transactions involved in this proceeding at the stated percentages set forth in Article III of the contract, regardless of the prices at which the sales were made or of any other alleged reservation contained in the contract, and that, inasmuch as he was not paid such percentages on these sales, he is entitled to recover from defendant the difference between what was paid him and the amount he should have received in accordance with the percentages stated in said Article III.

For a clearer understanding and proper consideration of the questions presented it is necessary to set forth somewhat fully the relevant and salient facts and circumstances. The evidence as to the facts materialized not from was undisputed.

AMERICAN CAN COMPANY,
CHICAGO, ILLINOIS.

This contract which was entered into between the American Can Company and the Pacific Screen in New York, required the installation of defendant's equipment in the plant being erected by said American Can Company at Chicago (Englewood), Illinois. The contract price was $98,000. Inasmuch as this contract came within the classification "placed by others outside the territory for products installed in buildings located within the territory," plaintiff claims that under

his contract with defendant he was entitled to receive a 5% commission or $4,757.80, and that having received but $2,500 commission, there is a balance due him of $2,257.80. May 19, 1930, defendant advised plaintiff by letter that it had received the contract for the installation of its equipment in this building and said further, "We are crediting your account with $2,500 on this job. We ask that you give us full cooperation in order that this job may be one of the finest the Peelle Company ever installed." May 21, 1930, plaintiff wrote in reply:

"I note you have credited my account with $2,500.00 commission on this job, but if the total amount of the contract is as above mentioned, you are not figuring the commission in accordance with my agency agreement, which calls for 5%. On some American Can jobs, you allowed the full 10%, but of course, I do not expect the full 10% on this job. However, I fell that I am entitled to the full 5%."

Subsequently, on June 4, 1930, plaintiff again wrote to defendant, saying:

"No doubt you will recall our conversation in reference to the commission on this job. I trust you have had an opportunity to go into this matter with Mr. H. E. Peelle and are prepared to allow me the regular 5% commission on this job. ***

"For your information, I wish to advise that my bookkeeper today gave me a statement showing a considerable loss during the first five months of this year. I have actually lost money, not figuring items of salary or profit; therefore, if you can give me the full 5% on this job, it will help to take me out of the red."

Defendant replied on June 7, 1930:

"It is true that we got a rather long price for the job but under present conditions and circumstances, I believe you might consider yourself fortunate that we were able to award you $2,500 commission which in one way is a break for Mr. Moring.

"We have been operating our business in the red since February 1. Not one single month of this year have we shown a profit due to lack of volume of business. ***

"The above job may be the only large sized job we will obtain out of the Chicago territory for the entire year, and as you know we have rearranged and added on to our overhead expenses by carrying the Chicago branch office under the new arrangement. We will need all we can make on the American Can job to help fight the game and in the Chicago territory. ***

"We also point out to you that the American Can job will be supplied with the new individual operators, and we do not know our costs, not having performed a large job of this size with this type of operator.

"While the price may look long, it may not be long before we get through.

his contract with defendant he was entitled to receive a 5% commission of $4,777.80, and that having received but $2,500 commission, there is a balance due him of $2,277.80. May 19, 1930, defendant advised plaintiff by letter that it had received the contract for the installation of its equipment in this building and said further, "We are crediting your account with $2,500 on this job. We ask that you give us full cooperation in order that this job may be one of the finest the Peelle Company ever installed." May 21, 1930, plaintiff wrote in reply:

"I note you have credited my account with $2,500.00 commission on this job, but if the total amount of the contract is as above mentioned, you are not figuring the commission in accordance with my agency agreement, which calls for 5%. In some instances has job, you allowed the full 10%, but of course, I do not expect the full 10% on this job. However, I feel that I am entitled to the full 5%."

Subsequently, on June 4, 1930, plaintiff again wrote to defendant, saying:

"No doubt you will recall our conversation in reference to the commission on this job. I trust you have had an opportunity to go into this matter with Mr. H. E. Peelle and are prepared to allow me the regular 5% commission on this job. ***

"For your information, I wish to advise that my bookkeeper today gave me a statement showing a considerable loss during the first five months of this year. I have actually lost money, not figuring items of salary or profit; therefore, if you can give me the full 5% on this job, it will help to take me out of the red."

Defendant replied on June 7, 1930:

"It is true that we got a rather long price for the job but under present conditions and circumstances, I believe you might consider yourself fortunate that we were able to award you $2,500 commission which in our say is a break for it, boring.

"We have been operating our business in the red since February 1. Not one single month of this year have we shown a profit due to lack of volume of business. ***

"The above job may be the only large sized job we will obtain out of the Chicago territory for the entire year, and as you know we have rearranged and added on to our overhead expenses by carrying the Chicago branch office under the new arrangement. We will need all we can make on the American Can job to help fight the game and in the Chicago territory. ***

"We also point out to you that the American Can job will be supplied with the new individual operators, and we do not know our costs, not having performed a large job of this size with this type of operator.

"While the price may look low, it may not be long before we get through.

"I trust you will appreciate that we want to see our representatives well compensated at all times, and perhaps it will work out that way at the end of the year. Anyhow, we ask you to bear with us in this case, and we want you to feel that we have been just as fair as we possibly could be under present conditions and circumstances."

Under date of February 3, 1931, plaintiff received from defendant a memorandum, which stated in part:

"We are enclosing check for $1,875 which is 75% of your commission on American Can job number 30232. This is approximately the amount which we have received on this job. We hope this will meet your immediate requirements."

Defendant's check for $1,875, dated February 3, 1931, and payable to the order of plaintiff, which bore on its face the notation "in settlement of 30232 $1,875," accompanied this memorandum. The Number 30232 was the contract number for this job. Plaintiff acknowledged receipt of defendant's foregoing memorandum and the check which accompanied same as follows:

"I acknowledge receipt of your letter of February 3, enclosing check for 75% of the commission on the American Can Company, job #30232."

Thereafter, on April 1, 1931, plaintiff received from defendant a statement of account showing, among other things, commissions earned by him, including the item of $2,500 commission on this American Can Company job, and the statement shows a balance due plaintiff of $999.54. Accompanying this statement of account was a check from defendant to plaintiff for $999.54, which was the amount of the balance shown to be due plaintiff in the statement of account. This check bears on its face the notation "in settlement of statement attached, $999.54." Plaintiff indorsed and cashed this check. Subsequent to his receipt of the foregoing statement of account and defendant's check for $999.54, plaintiff made no protest by letter or otherwise with regard to the commission awarded him on this job.

The American Can Company was a "National user." It will be noted that plaintiff in his initial protest as to the amount of commission awarded to him, said "I feel that I am entitled to the full 5% and that later he stated "If you can give me the full 5% on this job, it will help to take me out of the red." Then

"I hope you will appreciate that we want to see our representatives well compensated at all times, but perhaps it will work out that may be the end of the year. Anyhow, we ask you to bear with us in this case, and we want you to feel that we have been just as fair as we possibly could be under present conditions and circumstances."

Under date of February 3, 1932, plaintiff received from defendant a memorandum, which stated in part:

"We are enclosing check for $1,072 which is 75% of your commission on American Can job number 30232. This is approximately the amount which we have received on this job. We hope this will meet your immediate requirements."

Defendant's check for $1,072, dated February 3, 1932, and payable to the order of plaintiff, which bore on its face the notation "in settlement of 30232 $1,072," accompanied this memorandum. The number 30232 was the contract number for this job. Plaintiff acknowledged receipt of defendant's foregoing memorandum and the check which accompanied same as follows:

"I acknowledge receipt of your letter of February 3, enclosing check for 75% of the commission on the American Can Company job #30232."

Thereafter, on April 1, 1932, plaintiff received from defendant a statement of account showing other items, credited since mailed by him, including the item of $2,500 commission on this American Can Company job, and the statement shows a balance due plaintiff of $999.54. Accompanying this statement of account was a check from defendant to plaintiff for $999.54, which was the amount of the balance shown to be due plaintiff in the statement of account. This check bore on its face the notation "in settlement of statement attached, $999.54." Plaintiff indorsed and cashed this check. Subsequent to his receipt of the foregoing statement of account and defendant's check for $999.54, plaintiff made no protest by letter or otherwise with regard to the commission awarded him on this job.

The American Can Company was a "National account." It will be noted that plaintiff in his initial protest as to the amount of commission awarded to him, said "I feel that I am entitled to the full 5% and that later he stated "If you can give me the full 5%

after the exchange of correspondence, which apparently satisfied him as to the fairness of the allowance of commission, he made no further protest and accepted the amount awarded in full payment and settlement of his commission on this job.

UNITED STATES POST OFFICE,
SOUTH BEND, INDIANA.

The contract for the installation of defendant's equipment in this building was procured by one Zoller, who was employed in defendant's home office in New York and plaintiff had nothing to do with fixing the price on this job. In connection with this transaction plaintiff testified that the home office wrote him a letter that due to the fact that all bids were taken in Washington on Government jobs "they would act as a clearing house for all quotations" that went out and that in order to get any of the Government jobs, it would be necessary to "cut down prices." On September 8, 1931, defendant wrote to plaintiff enclosing the manufacturing order for this job and stated, "we are crediting your account with $129.00 commission on this job." Under date of September 14, 1931, defendant wrote plaintiff stating:

"Mr. Zoller closed this job with the American Elevator and Machine Company at the price of $3,120.00 net."

On November 1, 1931, defendant sent plaintiff a statement of account which showed the allowance to him of $129 commission on this job. Subsequently, on September 26, 1933, defendant sent plaintiff a further statement of account again showing the award to him of $129 commission on this job. Plaintiff testified that he was unable to recall whether he had any further communication with defendant with respect to this transaction after September 26, 1933. He further testified that during the life of the contract from May, 1930, to December, 1933, he received from time to time from defendant's home office statements of account with respect to commissions which had accrued to him and that these statements were issued about the first of every month, showing cash paid him, withdrawals that had been made by him, whether or not he was overdrawn or underdrawn and the amount of balance due, etc.

after the exchange of correspondence, which apparently satisfied him as to the fairness of the allowance of commission, he made no further protest and accepted the amount awarded in full payment and settlement of his commission on this job.

United States Court of Claims,
Washington, December.

The contract for the installation of defendant's equipment in this building was procured by one Miller, who was employed in defendant's home office in New York and plaintiff had nothing to do with fixing the price on this job. In connection with this transaction plaintiff testified that the home office wrote him a letter that due to the fact that all bids were taken in Washington on government job "they would act as a clearing house for all quotations" that went out and that in order to get any of the Government job, it would be necessary to "cut down prices." On September 6, 1923, defendant wrote to plaintiff enclosing the accepted-bidding order for this job and stating, "We are crediting your account with $123.50 commission on this job." Under date of September 14, 1923, defendant wrote plaintiff stating:

"Mr. Miller closed this job with the Department of Treasury and Machine Company at the price of $2,130.00 net."

On November 1, 1923, defendant sent plaintiff a statement of account which showed the allowance to him of $123 commission on this job. Subsequently, on September 26, 1923, defendant sent plaintiff a further statement of account again showing the award to him of $123 commission on this job. Plaintiff testified that he was unable to recall whether he had any further communication with defendant with respect to this transaction after September 26, 1923. He further testified that during the life of the contract from May, 1920, to December, 1923, he received from time to time from defendant's home office statements of account with respect to commissions which had accrued to him and that these statements were issued about the first of every month, showing cash paid him, withdrawals that had been made by him, whether or not he was overdrawn or underdrawn and the amount of balance due, etc.

This contract was taken at a greatly reduced price and at no time did plaintiff protest the $129 commission allowed and paid him.

CONTINENTAL CAN COMPANY
HOUSTON, TEXAS.

The contract for the installation of defendant's equipment in this building was obtained in 1933. The contract price was $1,350 less 10%, or a net price of $1,215. Plaintiff was awarded and received a commission of $50 on this transaction but claims he was entitled to receive 5% of the net contract price or $60.75 and that there was a balance due him of $10.75. On June 15, 1933, plaintiff telegraphed defendant at New York that the Chief Engineer of the Continental Can Company "advise our price away out of line" and wanted to know if defendant cared to make any reduction in price. In response to this telegram defendant wrote plaintiff on the same date as follows:

"We are about through with price cutting, though we have made some concession on the original price quoted for the above job. ***

"In the past month the price of our motorized sheaves have advanced in material costs alone 15%; steel has advanced, lumber has advanced, malleable iron has advanced, chain has advanced, and there is no question in my mind but that labor will be advanced within the next six months. It is time for these buyers to get it into their heads that the price cutting era is over.

"We have run plenty in the red during the past year, and even if we were to get top prices on the volume of business we could corral today, we would still be in the red. Therefore, in your selling arguments these are some of the points you want to use when it comes to a question of price. We only ask a fair price for our product, and a fair profit. I mean by a fair profit 10%, and we can only make this 10% by sticking by our list price and carry the discount for the elevator companies in the bargain. So, with the concession we have made on the above job, we will do well to break even at the figure we have quoted, because the job is away down in Texas and we will have to send an experienced man to erect which would be an additional expense to this particular installation."

On July 13, 1933, plaintiff wrote defendant stating:

"I trust that you have made your setup on the above job and that you will be able to advise me the amount of commission I will be credited with on this job, as per our conversation when you were in Chicago."

Under date of July 18, 1933, defendant replied to plaintiff's letter stating that as soon as the erection item was settled, he would be advised as to the amount of his commission. Thereafter, on July 27,

This contract was taken at a greatly reduced price and at no time did plaintiff protest the $150 commission allowed and paid him.

CONTINENTAL GAS COMPANY
Contract, Installation.

The contract for the installation of defendant's equipment in this building was obtained in 1922. The contract price was $1,370 less 10%, or a net price of $1,233. Plaintiff was awarded and received a commission of $50 on this transaction but claims he was entitled to receive 5% of the net contract price or $60.75 and that there was a balance due him of $10.75. On June 17, 1922, plaintiff telegraphed defendant at New York that the Chief Engineer of the Continental Gas Company "advise our price every evil of line" and wanted to know if defendant cared to make any reduction in price. In response to this telegram defendant wrote plaintiff on the same date as follows:

"We are about through with price matter. Though we have made some concession on the original price quoted for the above job. ...

"In the past month the price of our particular commodity has advanced in material costs alone 12%; wages have advanced, labor has advanced, multiple lines has advanced, freight has advanced, and there is no question in my mind but that labor will be advanced within the next six months. It is time for those buyers to get it into their heads that the price situation are past.

"We have run plenty in the red during the past year, and even if we were to get top prices on the volume of business we could hardly today, we would still be in the red. Therefore, in your selling arguments these are some of the points you must be sure when it comes to a question of price. We only ask a fair price for our product, and a fair profit. I mean by a fair profit 10% and we can only make this job by selling by our list prices and carry the discount for the advertiser suggested in the margin. So, with the concession we have made on the above job, we will be well to break even at the figure we have quoted, because the job is away down in Texas and we will have to send an experienced man to erect which would be an additional expense to this particular installation."

On July 1, 1922, plaintiff wrote defendant stating:

"I trust that you have made your setup on the above job and that you will be able to advise me the amount of commission I will be credited with on this job, as per our conversation when you were in Chicago."

Under date of July 18, 1922, defendant replied to plaintiff's letter stating that as soon as the correction item was settled, he would be advised as to the amount of his commission. Thereafter, on July 27,

1933, defendant wrote plaintiff:

"For your information, your account has been credited with $50 commission on this job."

Plaintiff did not reply to this letter. On August 31, 1933, defendant sent plaintiff a statement of account showing an award of $50 commission on this job and again on November 24, 1933, a similar statement of account was sent him.

The Continental Can Company was a "National user," and this order was taken at a reduced price. Plaintiff made no protest whatsoever against the $50 commission awarded him.

UNITED STATES POST OFFICE
NEW YORK CITY.

This contract for the furnishing and installation of defendant's equipment was obtained by plaintiff from the Westinghouse Electric Company in 1931. The price of $15,250 was made up in defendant's home office and plaintiff had nothing to do with fixing same. On January 16, 1933, plaintiff wrote defendant:

"You will no doubt remember the conversation you had with the writer in reference to the commission on the above building.

"I told you at the time I secured the order that I would leave this entirely up to your own good judgment as to what commission you could pay on this order. Up to the present time I have not had any commission set-up, and I trust that the job has progressed far enough so that you can advise me at this time what commission you will be able to allow me."

Defendant replied to this letter under date of January 18, 1933, as follows:

"In reply to your letter of January 16th with reference to our arrangement with you for commission on the above job, - it is true that we have put the job through the factory, and if we can do as well in the field as we have done in the factory, we will be able to almost break even on the job, that is carry full overhead.

"We are going to be able to allow you a commission on this job, but this cannot be determined until we complete the erection work. ***

"In order to come out even on the job we will have to erect these doors not to exceed $15.00 per opening, complete labor cost. This I believe we can do, and at least I can say that there will be some commission in the job for you. How much is something we cannot determine at this time, as stated above."

On May 9, 1933, plaintiff wrote defendant:

"I trust that you were able to make the erection for the

1933, defendant wrote plaintiff:

"For your information, your account has been credited with $30 commission on this job."

Plaintiff did not reply to this letter. On August 31, 1933, defendant sent plaintiff a statement of account showing an award of $30 commission on this job and again on November 24, 1933, a similar statement of account for same job.

The Continental Gas Company was a "National user," and this order was taken at a reduced price. Plaintiff made no protest whatsoever against the $30 commission awarded him.

United States Gas Corporation
New York City.

This contract for the furnishing and installation of defendant's equipment was obtained by plaintiff from the Westinghouse Electric Company in 1932. The price of $13,250 was made up in defendant's home office and plaintiff had nothing to do with fixing same. On January 16, 1933, plaintiff wrote defendant:

"You will no doubt remember the conversation you had with the writer in reference to the commission on the above installation.

"I said you at the time I received the order that I would leave this entirely up to your own good judgment as to what commission you could pay on this order. By no means did I have any idea that any commission would, and I trust that the job has proven to be enough so that you can advise me at this time what commission you will be able to allow me."

Defendant replied to this letter under date of January 18, 1933, as follows:

"In reply to your letter of January 16th with reference to our arrangement with you for commission on the above job, - it is true that we have put the job through the factory, and if we can do as well in the field as we have done in the factory, we will be able to allow you a good commission on the job, that is very full overhead.

"We are going to be able to allow you a commission on this job, but this manner of determining will be complete the question.

"In order to make you some on the job we will have to start there does not is closed 11.00 per cent, complete labor cost. This I believe we can do, and at least I know any that there will be some commission in the job for you. The main is something or cannot determine at this time, as she not leave."

On May 1, 1933, plaintiff wrote defendant:

"I trust that you were able to make the arrangements for the

price that you advised me you would be able to when you were last in Chicago, and that the job has shown you a profit, and I hope you will be able to allow me the regular commission on this job. If you can do this, I will be glad to take Tax Warrants in place of cash, as I believe I will be able to dispose of them in Chicago, although I may have to take quite a discount in order to get cash on them. ***

"To date I have only received $110.00 this year, from Peelle Co. I will appreciate all you do for me, and will repay all favors."

Defendant replied to the foregoing letter under date of May 11, 1933, and, among other things, stated:

"In reply to your letter of May 9th regarding your commission on the above job, while we did very well on the final wind-up of this job, yet the showing was not sufficient to allow you your regular commission of 5%, which would have made a total of $762.50.

"We, of course, have not received any money whatsoever on previous billings made to Westinghouse covering this job, but to help you out we will not ask you to wait until they pay.

"We can pay you $420.00 cash, or you can take $600.00 worth of Chicago tax warrants. We rate this at the present time to be worth $70.00 in Chicago, and you might be able to get better than $70.00. The last quotation we had from you was $72.00. Therefore, if you will advise me immediately, we will either send you a check for $420.00 or tax warrants in the amount of $600.00."

On May 15, 1933, plaintiff telegraphed defendant as follows:

"Re letter eleventh will accept tax warrants."

On the same date defendant wrote plaintiff:

"In accordance with your telegram to Mr. C. W. Peelle, we are enclosing Tax Warrants in the amount of $600 in full payment of your commission on contract 31358, U. S. Post Office."

Also on the same date, subsequent to the despatch of his foregoing telegram, plaintiff wrote defendant:

"In reply to your letter of the 11th, we wired you as per enclosed copy of telegram, and we presume that you would much rather be out the Tax Warrants than you would the cash at this time, so I will be glad to accept them. I do not know at this writing just what I will be able to get for them, but I will in all probability be able to use them."

On June 23, 1933, defendant sent plaintiff a statement of account, including items of commissions allowed on various jobs, on which statemnt appeared, the United States Post Office job in New York City, Contract No. 31358, showing an allowance of $600 commission on same. On this statement of account appears the notation, "We have issued $600.00 worth of Certificates of Acceptance on 31-358, to you."

"To date I have only received $110.00 this year, from Phillip Co. I will appreciate all you do for me, and will report all taxes."

Defendant replied to the foregoing letter under date of May 11, 1931, and, among other things, stated:

"In reply to your letter of May 9th regarding your commission on the above job, while we did very well in the final completion of this job, yet the income was not sufficient to allow you your regular commission of 5%, which would have made a total of $[illegible].

"We, of course, have not received any money whatsoever on previous billings made in installments covering this job, but is duly you out we will not ask you to wait until they pay.

"We can pay you $420.00 cash, or you can take $[illegible] worth of Chicago tax warrants. In fact this is the present time be worth $70.00 in Chicago, and you might be able to get better than $70.00. The last quotation we had from you was $[illegible]. Therefore, if you will advise me immediately, we will direct what I can do for $420.00 or tax warrants in the amount of $500.00."

On May 15, 1931, plaintiff telegraphed defendant as follows:

"He letter eleventh will accept tax warrants."

On the same date defendant wrote plaintiff:

"In accordance with your telegram to Mr. E. T. Phillip, we are enclosing Tax Warrants in the amount of $500 in full payment of your commission on contract [illegible]. [illegible]."

Also on the same date, accompanied by the despatch of the foregoing telegram, plaintiff wrote defendant:

"In reply to your letter of the 11th, we wired you as per enclosed copy of telegram, and we trust that you will see fit either be out the tax warrants than you would like work at this time, as I will be glad to accept them. I do not know at this writing just when I will be able to get for them, but I will do all possibility be able to use them."

On June 11, 1931, defendant sent plaintiff a statement of account, including items of commissions allegedly on various jobs, on which statement appeared, the initial plaintiff had filing job in New York City, Contract No. [illegible], showing an allowance of $500 commission on same. On this statement of account appears the notation, "We have issued $500.00 worth of Certificates of indebtedness on [illegible], to you."

This order was taken at a greatly reduced price. During the exchange of correspondence plaintiff stated in the first instance "I told you at the time I secured this order that I would leave this entirely up to your own good judgment as to what commission you could pay on this order," and later "I hope you will be able to allow me the regular commission on this job." Then when he was offered $420 in cash or "$600 worth of Chicago tax warrants" in full payment of his commission on this job, he accepted the tax warrants.

UNITED STATES POST OFFICE,
Davenport, IOWA.

This contract was obtained by someone other than plaintiff from the American Elevator and Machine Company in Louisville in 1932, for the installation of defendant's equipment in this building within plaintiff's territory.

Plaintiff was allowed and accepted a commission of $46.88, which was 2-1/2% of the net contract price. He now claims that he was entitled to receive 5% commission or $93.75 and that the unpaid balance due him is $46.87.

On February 29, 1932, defendant wrote plaintiff:

"American Elevator and Machine Company, Louisville, Kentucky, are low bidders on the above job and will no doubt be awarded the contract."

"It will not be necessary for you to do anything on this job unless you receive contrary instructions.

"You are no doubt familiar with Buckridge's contract with the American Elevator Company. He will keep you fully posted of the developments."

In response to repeated inquiries from plaintiff as to whether this contract had been secured, defendant wrote plaintiff on May 11, 1932.

"In reply to your letter dated May 9, we have received the formal order from the American Elevator & Machine Company, but it is being held up until we can talk to Buckridge about it.

"Although we believe that we will accept the order the price is such that there will be no commission in it whatever. We will, however, set up a nominal amount for you. As soon as the matter has been settled we will notify you how much commission we have credited to your account, and will at that time send you a copy of the order."

This order was taken at a greatly reduced price. During the exchange of correspondence plaintiff stated in the first instance "I told you at the time I secured this order that I would leave this entirely up to your own good judgment as to what commission you could pay on this order," and later "I hope you will be able to allow me the regular commission on this job." Then when he was offered $420 in cash or "$600 worth of Chicago tax warrants" in full payment of his commission on this job, he accepted the tax warrants.

UNITED STATES POST OFFICE,
Davenport, IOWA.

This contract was obtained by someone other than plaintiff from the American Elevator and Machine Company in Louisville in 1932, for the installation of defendant's equipment in this building within plaintiff's territory.

Plaintiff was allowed and accepted a commission of $46.88, which was 2-1/2% of the net contract price. He now claims that he was entitled to receive 5% commission or $93.75 and that the unpaid balance due him is $46.87.

On February 23, 1932, defendant wrote plaintiff:

"American Elevator and Machine Company, Louisville, Kentucky, are low bidders on the above job and will no doubt be awarded the contract."

"It will not be necessary for you to do anything on this job unless you receive contrary instructions.

"Let me do doubt further with Brewbiger's connected with the American Elevator Company. He will keep you fully posted of the developments."

In response to repeated inquiries from plaintiff as to whether this contract had been secured, defendant wrote plaintiff on May 11, 1932:

"In reply to your letter dated May 9, we have received the formal order from the American Elevator & Machine Company, but it is being held up until we can talk to Pocketbridge about it.

"Although we believe that we will accept the order the price is such that there will be no commission in it whatever. We will, however, set up a nominal amount for you. As soon as the matter has been settled we will notify you how much commission we have credited to your account, and will at that time send you a copy of the order."

On May 13, 1932, plaintiff wrote defendant:

"I am pleased to note that you have received the formal order from the American Elevator and Machine Company covering doors on the above building and that you are not sure whether or not you will accept the order.

"I note that the price is such that there will be no commission in it whatsoever but that you will set up a nominal amount for this office.

"To say that this is discouraging is putting it very mildly. I certainly figured on getting a full commission out of this job.

"It seems to me that the way the government jobs are going it might be a good idea to let someone else handle them or get together with our competitors so that when we do get them there will be some profit in them.

"If there was a lot of business at this time, I would not object to waiving the commission on these jobs but with present conditions it is almost impossible for me to operate on present commissions. At present I do not know how long it will be possible for me to operate without calling on you for assistance."

On May 16, 1932, defendant replied to the foregoing letter as follows:

"In reply to your letter dated May 13 regarding the commission on this job, I believe that if you have checked the price at which this business was taken for the material furnished, you will have no further criticisms as to the commission set up for you on this work.

"This Government work is merely a question of taking it or leaving it.

"If, after going over the job, you are unwilling to accept the commission we have set up for you, we still have an opportunity of turning the contract down. In looking at it from this angle, it is a question of taking what we can get, or not taking anything. Furthermore, as you know, Bright gets in on every one of these jobs, and no matter what price we got for the job, a part of the commission on the job would have to be credited to Tom Bright's account.

"With regard to the suggestion that we ought to get together with our competitors on this work, we are willing to try any suggestions that you have to offer. In the first place you would have to line up St. Louis, Richmond and Security, and then if your price were too high, these jobs would automatically go to Haughton and Westinghouse who make their own operators. This is a helpless situation so far as we can see from a standpoint of price. If you have any suggestions to offer, we will certainly consider them and try them if at all possible."

Two days latter, on May 18, 1932, plaintiff sent this reply:

"In reply to your letter of May 16th, in reference to the commission set up on the U. S. Post Office Job at Davenport, please be advised that I was not criticizing for the amount of commission set up on this work but I was just telling you that I was very much disappointed as I was hoping to get a full commission on this job but I agree with you that it would be much better to take what we can than to let these jobs go to our competitors.

On May 11, 1932, plaintiff wrote defendant:

"I am glad to note that you have received the formal order from the Navy Department covering the machine. Please on the above building and that you are not sure the day on but you will accept the order.

"I note that the price is such that there will be no commission in it whatsoever but that you will set up a nominal amount for this office.

"So say that this is discouraging is putting it very mildly. I certainly figured on getting a full commission out of this job.

"It seems to me that the way the government goes on giving it might be a good idea to let someone else handle them or get people with our competitors so that when we do get some there will be some profit in them.

"If there was a lot of business at this time, I would not object to waiving the commission on these jobs but with present conditions it is almost impossible for me to operate on present commissions. At present I do not know how long it will be possible for me to operate without calling on you for assistance."

On May 16, 1932, defendant replied to the foregoing letter as follows:

"In reply to your letter dated May 13 regarding the commission on this job, I believe that if you have checked the price at which this business was taken for the memorial fraternity, you will have no further criticisms as to the commission set up for you on this work.

"This government work is merely a question of taking it or leaving it.

"If, after going over the job, you are unwilling to accept the commission we have set up for you, we still have an opportunity of burying the contract down. In looking at it from this angle, it is a question of taking what we can get, or not taking anything. Furthermore, as you know, I right gets in on every one of these jobs and we never know what price we get for the job, a part of the commission on the job could have to be credited to Joe Wright's account.

"With regard to the suggestion that we might be put together with our competitors on this work, we are willing to any any suggestions that you have to offer. In the first place you would have to line up St. Louis, Cincinnati and Louisville, and then if your price were too high, these jobs would automatically go to Brighton and Martinsville who make their own operators. This is a helpless situation so far as we can see from a standpoint of price. If you have any suggestions to offer, we are still certainly anxious and try them if at all possible."

Two days latter, on May 18, 1932, plaintiff sent this reply:

"In reply to your letter of May 16th, in reference to the commission set up on the G. . Joint Office job at Newport, please be advised that I was not originally for the amount of commission set up on this work but I was just telling you that I was very much disappointed as I was hoping to get a full commission on this job but I agree with you that it would be much better to take what we can than to let these jobs go to our competitors.

"I feel that it is a crime to have to take all this government work at such ridiculously low prices. There ought to be some way to line up our competitors on this government business even if you have to split the business on an equal basis. We would at least get a good profit out of the jobs we do for them. Under the present arrangement no one makes anything out of any of the jobs."

On July 16, 1932, defendant furnished plaintiff with a statement of account showing commissions accrued and due on various transactions, including an item covering the Davenport Post Office job, Contract No. 3268, which showed an award of commission of $46.88. Defendant's list price on this job was $3,500 and the price at which the contract was taken was 46% below said list price.

This contract was taken at a reduced price. Here we find both parties decrying the poor prices being paid on government jobs. Defendant advised plaintiff that this order was taken at such a low price that no commission could be allowed but that it "will set up a nominal amount for you." Plaintiff states "I certainly figured on getting a full commission on this job." Defendant writes back, "If, after going over the job, you are unwilling to accept the commission we have set up for you, we still have an opportunity of turning the contract down." Then plaintiff replies that he "was not criticizing for the amount of commission set up on this contract." Plaintiff was allowed and paid a commission of $46.88. There certainly was no insistence here that he was entitled to be paid commission at a rate stipulated in the agency contract.

FIRESTONE TIRE & RUBBER COMPANY,
CHICAGO, Illinois.

The contract covering this transaction was obtained by plaintiff from the Otis Elevator Company in Chicago in 1931, at a net price of $1,071. Plaintiff now claims 10% commission on same, which would be $107.10. He received $25 and claims a balance due of $82.10. Under date of October 31, 1931, defendant wrote plaintiff acknowledging receipt of this order and stated, "We are crediting your account with $25 commission on this job." Thereafter, on April 18, 1932, defendant sent plaintiff a statement of account showing various commission allowances, including an award of commission on this job of $25. Plain-

"I feel that it is a crime to have to take all this government work at such ridiculously low prices. Don't again to be some way to line up our employees as well government officials even if you have to split the business on an equal basis. We would at least get a good profit out of the job as it for them. Under the present arrangement no one makes anything out of any of the jobs."

On July 16, 1934, defendant furnished plaintiff with a statement of account showing commissions earned and due on various transactions, including an item crediting the defendant for this job, Contract No. 2268, which showed an award of commission of $46.88. Defendant's list price on this job was $3,300 and the price at which the contract was taken was 48% below said list price.

This contract was taken at a reduced price. Here we find both parties decrying the poor prices being paid on government jobs. Defendant advised plaintiff that this order was taken at such a low price that no commission could be allowed but that it "will set up a nominal amount for you." Plaintiff states "I certainly figured on getting a full commission on this job." Defendant writes back, "If, after going over the job, you are unwilling to accept the commission we have set up for you, we still have an opportunity of turning the contract down." Then plaintiff replies that he "was not criticizing for the amount of commission set up on this contract." Plaintiff was allowed and paid a commission of $46.88. There certainly was no insistence here that he was entitled to be paid commission at a rate stipulated in the agency contract.

PLAINTIFF'S TYPE A FORMS CONTRACT,
CHICAGO, Illinois.

The contract covering this transaction was obtained by plaintiff from the city director company in Chicago in 1933, at a net price of $1,972. Plaintiff for claim 1/2 commission on same, which would be $197.10. He received $15 and claims a balance due of $182.10. Under date of October 11, 1933, defendant wrote plaintiff acknowledging receipt of this order and stated, "We are crediting your account with $15 commission on this job." Thereafter, on April 12, 1934, defendant sent plaintiff a statement of account showing various commission allowances, including an award of commission on this job of $15. Plaintiff-

tiff's list price on this job was $1,580 and the price at which the contract was taken was $400 less than list. There is no evidence that plaintiff by letter or otherwise, either before or after April 18, 1932, made any complaint or protest concerning the commission allowed him on this transaction.

This contract was taken at a reduced price and prior to the institution of this suit plaintiff made no protest at any time as to the amount of commission awarded and paid him.

W. T. RALEIGH COMPANY,
FREEPORT, ILLINOIS.

This contract was obtained by plaintiff in 1931 at the price of $4,800. He now contends that under the terms of his agency contract he was entitled to a commission of 10% of said amount or $480. He received $283 and claims a balance due of $197.

On November 27, 1931, plaintiff wrote defendant a letter enclosing the order on this job and stated therein:

"For your information, we may add that we had a very hard time to get this order due to the low prices quoted by Richmond, Security and Harris Prebble."

Under date of November 30, 1931, defendant wrote plaintiff:

"We appreciate the effort you put forth on this job, but we are sorry that the price is so low that the question of commission can hardly be settled at this time.

"The F. O. B. basis which you used in making up the price cannot be used in a territory where The Peelle Company carries the office overhead. This method is now only being used on the west coast where The Peelle Company does not pay any overhead in any of the offices. Furthermore, the discount is not 10% and 10% which you used, but is only 10%. Jobs in your territory to be figured correctly are based on the erected price list.

"We appreciate all of the effort that you put forth on the job and we therefore want to give you as much commission as possible. The only way we know of to do this is to wait until the job has been completed and all of the costs have been tabulated, and if we can give you more than the $397 which you set up we will certainly do so. If the job shows a loss, we will, of course, have to set a nominal amount, as we know that you would not want the full commission if the job showed a loss."

On January 4, 1932, plaintiff wrote defendant:

"In reply to your letter of December 30th in reference to the cost of frames on the above building, we are pleased to advise you that we were able to purchase these frames for the lump sum of $84, and you will note that the set-up on our estimate sheet was $300. This gives us a net profit of $214 on the purchase of this item.

Miff's list price on this job was $4,200 and therefore at which the contract was taken was $400 less than list. There is no evidence that plaintiff by letter or otherwise, either before or after April 18, 1932, made any complaint or protest concerning the commission allowed him on this transaction.

This contract was taken at a reduced price and prior to the institution of this suit plaintiff made no protest at any time as to the amount of commission awarded and paid him.

E. F. Milton Company,
Kansas City, Missouri.

This contract was obtained by plaintiff in 1931 at the price of $4,800. He now contends that under the terms of his agency contract he was entitled to a commission of 10% of said amount or $480. He received $283 and claims a balance due of $197.

On November 27, 1931, plaintiff wrote defendant a letter enclosing the order on this job and stated therein:

"For your information, we may add that we had a very hard time to get this order due to the low prices quoted by Hammond, Security and Davis Freight."

Under date of November 30, 1931, defendant wrote plaintiff:

"We appreciate the effort you put forth on this job, but we are sorry that the price is so low that the particular of [illegible] can hardly be settled at this time.

"On E. O. B. Davis Shipping you used to [illegible] the price cannot be used in a territory where The Fedlis Company carries the office overhead. This method is now only being used on the west coast where The Fedlis Company does not pay any overhead in any of the offices. Furthermore, the discount is not 10% and 10% which you used, but is only 10%. Also in your territory is [illegible] [illegible] ly are based on the erected price list.

"We appreciate all of the effort that you put forth on the job and we therefore want to give you at each opportunity as possible. The only way we know of to do this is to wait until the job has been completed and all of the costs have been tabulated, and if we can give you more than the $400 which you are up we will certainly do so. If the job shows a loss, we will, of course, have to [illegible] a nominal amount, as we know that you would not want the full [illegible] if the job showed a loss."

On January 4, 1932, plaintiff wrote defendant:

"In reply to your letter of December 30th in reference to the cost of frames on the above building, we are pleased to advise you that we were able to procure these frames for the lump sum of $4[illegible], and you will note that the set-up on our estimate sheet was $500. This gives us a net profit of $214 on the purchase of this item.

"We hope that through the additional profit you were able to make on this item, that you will be able to allow us a straight 10% selling commission on this job."

On January 6, 1932, defendant replied as follows:

"Your letter of January 4th with reference to the final cost analysis of the above job has been referred to me for settlement.

"I find that we have finally completed the costs on this job and we can break even and carry our overhead by allowing you $283.00 commission. We perhaps could have done better, but under present conditions, with low production, we are under a high percentage of overhead, which we cannot avoid and we did not put full overhead against the job at that, as we did not feel like charging the overhead against the field work, as we usually do on all jobs and the savings you were to effect on the iron work was certainly a big item of help. Then we had an item of $174.19 for freight costs, total raw material costs approximately $1,500.

"I am sorry that we could not work the job out to give you a straight 10%. We ourselves are taking no net profit from the job but in spite of this, under present conditions, we are pleased to get the job to help us that much, at least on our overhead."

Under date of January 6, 1932, defendant sent plaintiff its check for $283, bearing on its face "in settlement of commission on 31343, Raleigh." Plaintiff indorsed and cashed this check. On January 14, 1932, defendant sent plaintiff a statement of account showing an award of commission of $283 on this job, which amount plaintiff received. On February 2, 1932, plaintiff received from defendant a further statement of account, which also showed the item of $283 commission on this job. Plaintiff did not communicate with defendant with respect to this award of commission subsequent to February 2, 1932.

This contract was made at a reduced price. In the exchange of correspondence plaintiff did write defendant that he hoped "that you will be able to allow us a straight 10% selling commission on this job." When defendant replied, "I am sorry that we could not work the job out to give you a straight 10%" and forwarded to plaintiff its check for $283, bearing the notation thereon, "In settlement of commission on 31343 Raleigh," plaintiff made no protest and cashed the check.

AMERICAN CAN COMPANY
CLYBOURNE AVENUE,
CHICAGO, ILLINOIS.

We hope that therein the antitrust people you were able to make on this item, that you will be able to allow us a straight 10% selling commission on this job."

On January 6, 1932, defendant replied as follows:

"Your letter of January 4th with reference to the final cost analysis of the above job has been referred to me for settlement.

"I find that we have finally completed the costs on this job and we can break even and carry our overhead by allowing you $283.00 commission. We perhaps could have done better, but under present conditions, with low production, we are under a high percentage of overhead, which we cannot avoid and we did not put full overhead against the job at that, as we did not feel like charging the overhead against the field work, as we usually do on all jobs and the savings you were to effect on the iron work was certainly a big item of help. Then we had an item of $174.19 for freight costs, total has material costs approximately $1,300.

"I am sorry that we could not work the job out to give you a straight 10%. We ourselves are taking no net profit from the job but in spite of this, under present conditions, we are pleased to get the job to help us that much, at least on our overhead."

Under date of January 6, 1932, defendant sent plaintiff its check for $283, bearing on its face "In settlement of commission on 12343, Ralstg." Plaintiff indorsed and cashed this check. On January 14, 1932, defendant sent plaintiff a statement of account showing an award of commission of $283 on this job, which amount plaintiff received. On February 3, 1932, plaintiff received from defendant a further statement of account, which also showed the item of $283 commission on this job. Plaintiff did not communicate with defendant with respect to this award of commission subsequent to February 2, 1932.

This contract was made at a reduced price. In the exchange of correspondence plaintiff did write defendant that he hoped "that you will be able to allow us a straight 10% selling commission on this job." Then defendant replied, "I am sorry that we could not work the job out to give you a straight 10%" and forwarded to plaintiff its check for $283, bearing the notation thereon, "In settlement of commission on 12343 Ralstg." Plaintiff made no protest and cashed the check.

Plaintiff obtained this contract at a net price of $4,300. He received $300 commission but now claims that he was entitled to receive a commission of 10% of the contract price or $430 and that there is a balance due him of $130. On October 9, 1930, plaintiff wrote defendant:

"Your letter of October 4th, advising me that you are setting up 5% commission for the sale of the above mentioned job has been received by the writer, and I will say that your letter has taken all the pep, energy and ambition right out of the writer.

"It is most discouraging, in view of all of the other discouraging situations we have to overcome in Chicago, and in all fairness, I feel that I am entitled to 10% commission on this contract. I negotiated this entire proposition with Mr. Love of the Chicago office and put in quite a lot of time on the job with Mr. Love; also this job was sold at a loaded list price, and not at a cut price.

"Had the job been taken at a cut price, then I would not have felt badly if you had asked me to accept 5%. The Staley job which we closed last week is another job on which I put weeks of work and finally had to accept 5% on it.

"I trust that you will advise me by return mail that you are crediting my account with 10% instead of 5% as stated in your letter."

Under date of October 15, 1930, defendant replied to plaintiff as follows:

"The writer has read your letter of October 9, addressed to Mr. H. E. Peelle, regarding your commission on the above job.

"The American Can Company, particularly this year, have proven to be 'bread and butter' for both yourself and The Peelle Company; not only in Chicago, but other territories as well. Were it not for the fact that we receive from them list price for our goods, we would certainly be up against it carrying on some of our overhead expense, in the Chicago office. Also, a certain proportion of the overhead has to be carried here in our New York office in engineering these jobs.

"Other jobs, as you know, are pretty lean. We ourselves are taking half a loaf, and less, in many cases this year.

"After all, the American Can Co. is a national user and uses Peelle equipment exclusively, due to the arrangement H. E. Peelle has with them. We agree you negotiated the entire sale, but on the other hand, it was due to our national arrangements that the job was closed. This contact with the American Can Co. costs us a lot of money to maintain, and we feel that 5% commission H. E. set up for you on this job, is entirely fair to everyone concerned under the circumstances."

On February 6, 1931, plaintiff again wrote defendant as to this transaction as follows:

"If you will refer to Mr. H. E. Peelle's letter of October 4th, in which he credits my account with 5% commission on this job, you will recall that the writer took this matter up with you when you

Plaintiff obtained this contract at a net price of $4,300. He received $130 commission but now claims that he was entitled to receive a commission of 10% of the contract price or $430 and that there is a balance due him of $130. On October 9, 1930, plaintiff wrote defendant:

"Your letter of October 6th, advising me that you are sending me $3 commission for the sale of the above machinery has been received by the writer, and I will let that your letter has taken all the joy, energy and ambition right out of the writer.

"It is most discouraging, in view of all of the other discouraging situations we have to overcome in Chicago, and in all fairness, I feel that I am entitled to 10% commission on this contract. I negotiated this entire transaction with Mr. Love of the Chicago office and put in quite a lot of time on the job with Mr. Love; also this job was sold at a loading list price, and not at a cut price.

"And the job was taken at a net price. Then I would not have felt badly if you had asked me to accept 3%. The yearly job which we closed last week is another job on which I put weeks of work and finally had to accept 3% on it.

"I trust that you will advise me by return mail that you are crediting my account with 10% instead of 3% as stated in your letter."

Under date of October 13, 1930, defendant replied to plaintiff as follows:

"The writer has read your letter of October 9, addressed to Mr. H. T. Peelle, regarding your commission on the above job.

"The American Gas Company, particularly this year, have proven to be 'bread and butter' for both yourself and Mr. Peelle Company; not only in Chicago, but other territories as well. Here it was for the fact that we receive from them list prices for our goods, we would certainly be up against it carrying on some of our overhead expense, in the Chicago office. Also, a certain proportion of the overhead has to be carried here in our New York office in engineering these jobs.

"Other jobs, as you know, are pretty lean. We ourselves are taking half a loss, and loss, in many cases this year.

"After all, the American Gas Co. is a national name and uses Peelle equipment exclusively, due to the arrangement H. H. Peelle has with them. We agree you negotiated the entire sale, but on the other hand, it was due to our national arrangements that the job was closed. This contact with the American Gas Co. costs us a lot of money to maintain, and we feel that 3% commission H. T. was up for you on this job, is entirely fair in everyone concerned under the circumstances."

On February 6, 1931, plaintiff again wrote defendant as follows:

"If you will refer to Mr. H. T. Peelle's letter of October 6th, in which he credits my account with 3% commission on this job, you will recall that the letter was with which you wrote me when you

were in Chicago. At that time you told me to let the matter ride until after we had completed the installation of the doors, to see how we came out on the job. Personally, I think we have completed installation at a very small cost. The conditions surrounding this sale were that the entire negotiation was handled by the writer with Mr. Love, of the American Can Company, in the Chicago office, and we secured a very high price for these five doors.

"I feel that in view of the above I should be given my regular 10% commission on the sale of this equipment.

"I trust that you will go into this and advise me what you can do on it."

On February 18, 1931, defendant made this reply to plaintiff's last letter:

"Referring to your letter of February 6 with reference to further commission on the above job, beg to advise you that we have finally gathered the complete costs on the job and find that our profit on the job would not warrant paying you a 10% under the circumstances.

"I think I pointed out to you heretofore that the American Can work all over the United States, and particularly in Chicago, is influenced by a good deal of expense and hard work on the part of Mr. H. E. Peelle here in New York. Mr. H. E. Peelle at the present time is in Florida, with the Chief Engineer, so you can see that this costs money. Aside from this, were it not for the American Can jobs we have had in Chicago during the past year, I do not believe we could afford to carry on the overhead expense in the Chicago office, which the prices on these jobs help support.

"We will give you a commission of three hundred ($300.00) dollars on this job. You may be surprised to learn that this leaves the Peelle Company exactly three hundred twenty-two ($322.00) dollars net profit."

Finally as to this transaction plaintiff wrote defendant on February 20, 1931:

"In reply to your letter of February 18, I want to thank you for allowing me a total of $300.00 commission on the above mentioned job. I appreciate the fact that the American Can Company's business costs money to sell; also the fact that they are helping to carry overhead expenses in the Chicago office.

"If business were anything like normal, you may rest assured that I would not say anything about the commission set-up on these jobs; however, in view of the fact that business is not anywhere near normal, my own personal income has been reduced about 75% over previous years, and the fact of the matter is, that I have not made enough money in the past year to really pay my living expenses. Therefore, I have to get as much as I possibly can out of each and every job. ***

"Again assuring you that your attitude on the above mentioned job is appreciated."

Thereafter, on March 1, 1931, defendant furnished plaintiff with a statement of account of commissions on various jobs, including the item of $300 commission on this transaction.

were in Chicago. It that time you felt as he in fact the entire time until after we had completed the transaction of our business, he was now on and on the job. Personally, I feel we have rendered installation at a very small cost. The conditions surrounding this sale were that the entire negotiations was handled by the writer with Mr. Love, of the American Air Compressor, in the Monroe office, and we secured a very high price for these five doors.

"I feel that in view of the above I should be given my regular 10% commission on the sale of this equipment.

"I trust that you will go into this and advise me what you can do on it."

On February 18, 1931, defendant made this reply to plaintiff's last letter:

"Referring to your letter of February 6 with reference to further commission on the above job, beg to advise you that we have finally completed the complete costs on the job and find that our profit on the job would not warrant paying you a 10% under the circumstances.

"I think I pointed out to you heretofore that the American Air was not the United States, and particularly in Chicago, is influenced by a good deal of expense and hard work on the part of Mr. H. H. Reille here in New York. Mr. H. H. Reille at the present time is in Florida, with the Chief Engineer, so you can see that this costs money. Aside from this, we is not for the American Can job we have had in Chicago during the past year, I do not believe we really afford to carry on the overhead expense in the Chicago office, with the prices on these jobs help support.

"We will give you a commission of three hundred ($300.00) dollars on this job. You may be surprised to learn that this leaves the Reille Company actually three hundred twenty-two ($322.00) dollars net profit."

Finally as to this transaction plaintiff wrote defendant on February 26, 1931:

"In reply to your letter of February 18, I want to thank you for allowing me a bonus of $300.00 commission on the above mentioned job. I appreciate the fact that the company's business is getting money to sell; also the fact that they are helping to carry overhead expenses in the Chicago office.

"If business were anything like normal, you may rest assured that I would not say anything about the commission being on these jobs; however, in view of the fact that business is not anywhere near normal, my own personal income has been reduced about 75% over previous years, and the fact of the matter is, that I have not made enough money in the past year to really pay my living expenses. Therefore, I have to pay as much as I possibly can out of each and every job. Any job is appreciated."

Again assuring you that your attitude on the above mentioned job is appreciated."

Thereafter, on March 1, 1931, defendant furnished plaintiff with a statement of account of commissions on various jobs, including the item of $300 commission on this transaction.

This purchaser was a "National user." In view of plaintiff's statement in his letter of February 20, 1931, "I want to thank you for allowing me a total of $300 commission on the above mentioned job," it is difficult to understand how plaintiff's claim for a balance due on this transaction could be allowed by either the jury or the court.

UNITED STATES POST OFFICE
MASON CITY, IOWA

This contract was obtained by plaintiff in 1931 from the Otis Elevator Company at Omaha, at a net price of $2,061.72. Plaintiff was awarded a commission of $222.13, but he now claims that he is entitled to a commission of 10% or $296.17 and that there is a balance due him of $74.04. He testified that the procedure followed in obtaining this contract was the same as that pursued in the other contracts with the United States Government involved in this case. On June 29, 1931, defendant wrote plaintiff acknowledging receipt of the contract and stating "we are crediting your account with $222.13, which is 7-1/2% of the net contract price."

Under date of July 1, 1931, plaintiff wrote defendant:

"In reply to the copy of your letter of June 29, in which you advised me that you are crediting our account with 7-1/2% commission in place of 10%, will you please advise me why the cut in the commission, as this is not in accordance with my contract with you. As this job was taken at list price I cannot see any necessity for making any cut. Therefore, I trust that you will advise me that you are allowing me the commission in accordance with my contract and so advise your accounting department. ***

"Paul: I don't object to cutting my commission when we have to cut our price, but I got to get a break sometimes." Geo."

On July 6, 1931, defendant answered plaintiff as follows:

"We acknowledge your letter dated July 1 in which you question your commission allowance on this job.

"This job was taken at list, less 5%, but it is not the reason why we credited your account with only 7-1/2% commission. We should have explained to you in our acknowledgment that 2-1/2% commission is credited to the Washington office, for the work they do in general on Government jobs. Bright keeps in very close touch with all Government projects and forwards to this office complete plans and specifications, notifies us the result of the opening of the bids, and lets us know immediately when elevator companies are awarded their

This performance was a "National Scandal." In view of plaintiff's statement in his letter of February 26, 1931, "I want to thank you for allowing me a total of $300 commission on the above mentioned job," it is difficult to understand how plaintiff's claim for a balance due on this transaction could be allowed by either the jury or the court.

UNITED STATES POST OFFICE
KANSAS CITY, IOWA

This contract was obtained by plaintiff in 1931 from the Otis Elevator Company at Omaha, at a net price of $2,061.75, Plaintiff was awarded a commission of $222.13, but he now claims that he is entitled to a commission of 10% or $206.17 and that there is a balance due him of $74.04. He testified that the procedure followed in obtaining this contract was the same as that pursued in the other contracts with the United States Government involved in this case. On June 29, 1931, defendant wrote plaintiff acknowledging receipt of the contract and stating "we are crediting your account with $222.13, which is 7-1/2% of the net contract price."

Under date of July 3, 1931, plaintiff wrote defendant:

"In reply to the copy of your letter of June 29, in which you advised me that you are crediting our account with 7-1/2% commission in place of 10%, will you please advise me why the cut in the commission, as this is not in accordance with my contract with you. As this job was taken at that price I cannot see any necessity for making any cut. Therefore, I trust that you will advise me that you are allowing me the commission in accordance with my contract and advise your accounting department. ***

"Until I saw the object in taking my commission when we have to cut our price, but I got to get a break sometimes." Geo."

On July 6, 1931, defendant answered plaintiff as follows:

"We acknowledge your letter dated July 3 in which you question your commission allowance on this job.

"This job was taken at 1948, less 7%, but it is not the reason why we credited your account with only 7-1/2% commission. We should have explained to you in our acknowledgment that 8-1/2% commission is granted to the maintenance office, for time work they do in general on development jobs. Right here in very close touch with all government employees and forwards to this office complete plans and specifications, notifies us the result of the opening of the bids, and lets us know immediately when identify companies are awarded work

formal contract. He also gives us any additional information that we need on the jobs. This is, of course, mostly routine work but takes up Bright's time and is worth 2-1/2% on the business that we are able to obtain. Furthermore, The Peelle Company is spending a lot of money in traveling expenses in obtaining and making contacts with the Government, which is taken care of by Frank Buckridge. We are not, however, penalizing our offices on account of this expense. These jobs are either cut and dried setups for Peelle before the bids go in, or else we do not get the business, so far as the Otis Office is concerned.

"Under the conditions, we hope that the 7-1/2% commission will be satisfactory to you."

On July 8, 1931, plaintiff wrote defendant:

"In reply to your letter of July 6, we note that Mr. Bright is being credited with 2-1/2% commission on all government jobs and we agree with you that he is entitled to this commission. Had you given us this explanation when you sent through the manufacturing order on this job we would not have questioned it."

This contract was one in which an outside office had been influential in closing the sale. In view of the statement in plaintiff's letter of July 18, 1931, that "we note that Mr. Bright is being credited with 2-1/2% commission on all government jobs, and we agree with you that he is entitled to this commission," and his further statement therein that "had you given us this explanation when you sent through the manufacturing order on this job we would not have questioned it," there is no justification for the allowance of plaintiff's claim for a balance of commission due on this transaction.

WESTERN ELECTRIC COMPANY
CHICAGO, ILLINOIS.

This contract was obtained by plaintiff in 1931 and the contract price was $7,475 less 10%, or $6,700.50 net. Plaintiff was awarded and received $335 commission. He claims he was entitled to receive 10% of the contract price, which, according to his computation, amounts to $663.50, and that there is a balance due him of $328.50. On September 29, 1931, defendant wrote plaintiff:

"We acknowledge your letter dated September 23rd with which you enclosed Otis' formal order on the above job.

"We have credited your account with 5% commission of the net contract price."

On October 1, 1931, defendant furnished plaintiff a statement of account showing commissions allowed on various jobs, including an it

ternal contract. He also gives us any additional information that we need on the job. This is, of course, merely routine work but looks up Midgley's time and is worth 1-1/2% on the business that we are able to obtain. Furthermore, the Pacific Security is spending a lot of money in travelling expenses in obtaining and dealing contracts with the Government, which is taken care of by Frank Dunbridge, we are not, however, penalizing our offices on expense of this character. These jobs are either our and trial account the Pacific before the 15th so is, or else we do not get the business, so far as the 15th office is concerned.

"Under the conditions, we hope that the 2-1/2% commission will be satisfactory to you."

On July 8, 1931, plaintiff wrote defendant:

"In reply, to your letter of July 7, we note that Mr. Wright is being credited with 2-1/2% commission on all government jobs, and we agree with you that he is entitled to this commission. But you gave us this explanation when you sent during the manufacturing order on this job we would not have questioned it."

This contract was one in which an outside office had been influential in closing the sale. In view of the statement in plaintiff's letter of July 13, 1931, that "we note that Mr. Wright is being credited with 2-1/2% commission on all government jobs, and we agree with you that he is entitled to this commission," and his further statement therein that "had you given us this explanation when you sent through the manufacturing order on this job we would not have questioned it," there is no justification for the allowance of plaintiff's claim for a balance of commission due on this transaction.

[illegible], Inc.

This contract was obtained by plaintiff in 1931 and the contract price was $7,475 less 10%, or $6,750.50 net. Plaintiff was awarded and received $337 commission. He claims he was entitled to receive 1% of the contract price, which, according to his computation, amounts to $669.50, and that there is a balance due him of $332.50.

On September 29, 1931, defendant wrote plaintiff:

"We acknowledge your letter dated September 23rd with which you enclosed your formal order on the above job.

"We have credited your account with 2% commission of the net contract price."

On October 1, 1931, defendant furnished plaintiff a statement of account showing commissions allowed on various jobs, including an item

of $335.02 commission awarded plaintiff on this order. This allowance of commission made by the defendant was accepted by plaintiff without question. The evidence disclosed that this contract was taken at 10% less than the list price.

This order was taken at a reduced price. The amount of commission awarded and paid plaintiff on this job was not disputed in any way prior to the institution of this action.

CHRISTIAN SCIENCE PUBLISHING COMPANY,
BOSTON, MASSACHUSETTS.

This contract was obtained by plaintiff in 1932 at a price of $3,000 net. Subsequently, by reason of additional equipment required, the contract price was increased to $3,270. Plaintiff was awarded and was paid a commission of $73.50, but he now claims he was entitled to receive a commission of 5% of the contract price or $163.50, and that there is a balance of commission due him on this transaction of $90. On July 29, 1932, defendant wrote plaintiff as follows:

"With regard to the commission on this job, we have figured the job every conceivable way in order to arrive at the greatest possible commission allowance. In spite of the fact that we have low hollow metal prices, the job figures a cut from the list price of 35% on the Peelle material, and in addition we are carrying the hollow metal item which is outside material without any carrying charge whatsoever.

"Both Mr. C. W. Peelle and I have spent considerable time analyzing this job from every angle, and the best we can allow on the job is a total of 4% commission which we are splitting equally between your office and Boston. The 4% applies to the total net contract price of $3,000, making a total commission to you of Sixty ($60) Dollars."

On October 13, 1932, defendant wrote plaintiff acknowledging receipt of a letter authorizing the furnishing of an additional door and stated:

"We are crediting your account with the additional amount of Thirteen Dollars and Fifty Cents commission on this job."

Under date of February 8, 1933, plaintiff wrote defendant enclosing an order for two dumbwaiter doors on this job and stated:

"You will note that these doors were sold on a basis of $200 list price as quoted in your letter of February 1st, and the writer trusts that you will be able to allow me 10% selling commission on this order."

of $735.02 commission awarded plaintiff on this order. This allowance of commission made by the defendant was accepted by plaintiff without question. The evidence discloses that this contract was taken at 10% less than the list price.

This order was taken at a reduced price. The amount of commission awarded and paid plaintiff on this job was not disputed in any way prior to the institution of this action.

[illegible]

This contract was obtained by plaintiff in 1932 at a price of $3,000 net. Subsequently, by reason of additional equipment required, the contract price was increased to $3,270. Plaintiff was awarded and was paid a commission of $73.50, but he now claims he was entitled to receive a commission of 3% of the contract price or $81.90, and that there is a balance of commission due him on this transaction of $8.40. On July 29, 1932, defendant wrote plaintiff as follows:

"With regard to the commission on this job, we have figured the job every conceivable way in order to arrive at the greatest possible commission difference. In spite of the fact that we have low bottom metal prices, the job figures a bit from the list price of 10% on the metal material, and in addition we are carrying the boiler metal item which is exclusive material without any markup charge whatsoever.

"With Mr. [illegible], Wells and I have spent considerable time analyzing this job from every angle, and the best we can allow on the job is a total of $8 commission which is our splitting equally between your office and Boston. The $8 applies to the total net contract price of $3,000, making a total commission value of sixty (60) dollars."

On October 13, 1932, defendant wrote plaintiff acknowledging receipt of a letter authorizing the furnishing of an additional door and stated:

"We are crediting your account with the additional amount of [illegible] Dollars and Fifty Cents commission on this job."

Under date of February 8, 1933, plaintiff wrote defendant enclosing an order for two Kawneer doors on this job and stated:

"You will note that these doors were sold on a basis of $200 list price as quoted in your letter of February 1st, and the [illegible] price that you will be able to allow us [illegible] on this order."

On February 14, 1933, defendant wrote acknowledging receipt of plaintiff's letter of February 8, and stated:

"We are crediting your account with Twelve Dollars and Fifty Cents ($12.50) commission on this additional order."

Defendant furnished plaintiff statements of account of commissions on various jobs, including the items $60, $13.50 and $12.50 allowed as commissions on this job. Subsequent to the receipt of these statements of account plaintiff raised no question as to the amount of commission awarded him. The contract price of this job was 37% below list price.

This contract was made at a greatly reduced price and at no time prior to the commencement of this suit did plaintiff protest against the amount of commission awarded and paid him.

WEST MICHIGAN DOCK AND WAREHOUSE
MUSKEGON, MICHIGAN.

DETROIT-EDISON COMPANY,
DETROIT, MICHIGAN.

The contract for the West Michigan Dock and Warehouse was obtained in 1933. The net contract price was $1,552. Plaintiff was paid no commission on this transaction but now claims that he is entitled to receive a commission of 5% of the net contract price or $77.60.

On the Detroit-Edison job plaintiff was paid $25 commission. That contract was also executed in 1933 at a net price of $1,825. Plaintiff now claims a commission of 5% or $91.25 on this job and that there is a balance of commission due him of $66.25. Concerning these two transactions defendant wrote plaintiff on August 25, 1933:

"We finally have both of these orders straightened out and are going ahead with them in the regular way. Both of these jobs are Westinghouse jobs and brings up the question of commission which is always raised by you on jobs of this kind.

"In asking for a commission on these jobs you imply that you were responsible for their closing, or that you want some of the commission that belongs to the representative who had closed the jobs. Both of these jobs were initiated by Arthur Otis in the Detroit territory and were closed for Peelle before they went to Chicago. I know that you don't want to take any commission that belongs to another agent. We have credited all of the commission that these jobs will bear to the credit of Arthur Otis who did the actual selling on the jobs and made it possible to get these jobs

On January 14, 1911, defendant wrote acknowledging receipt of plaintiff's letter of February 6, and stated:

"We are crediting your account with Twelve Dollars and Fifty Cents ($12.50) commission on this additional order."

Defendant credited plaintiff with amounts of commission on various jobs, including the items $65, $12.50 and $12.50 allowed as commissions on this job. Subsequent to the receipt of these statements of account plaintiff raised no question as to the amount of commission awarded him. The contract price of this job was 37% below list price.

This contract was made at a greatly reduced price and at the time prior to the commencement of this suit did plaintiff protest against the amount of commission awarded and paid him.

[illegible]
[illegible], [illegible].

[illegible]
[illegible], [illegible].

The contract for the West Michigan Dock and Warehouse was obtained in 1911. The net contract price was $1,[illegible]. Plaintiff was paid no commission on this transaction but now claims that he is entitled to receive a commission of 5% of the net contract price or $77.50.

On the Detroit-Wilson job plaintiff was paid $25 commission. That contract was also executed in 1913 at a net price of $1,025. Plaintiff now claims a commission of 5% or $51.25 on this job and that there is a balance of commission due him of $26.25. Concerning these two transactions defendant wrote plaintiff on August 5, 1913:

"We finally have both of these orders straightened out and are going along with them in the regular way. Both of these jobs are Switchboard jobs and brings up the question of commission which is always raised by you on jobs of this kind.

"In asking for a commission on these jobs you imply that you were responsible for their placing, or that you made some of the commission that belongs to the representative who had closed the jobs. Both of these jobs were initiated by Arthur Orth in the Detroit territory and were closed for Peelle before they went to Chicago. I know that you don't want to take any commission that belongs to another agent. We have credited all of the commission that these jobs will bear to you credit of Arthur Orth who did the actual selling on the jobs and made it possible to get these jobs

from the Westinghouse Company. In saying this I do not want to detract in any way from the work that you did with Charles Rapp on these two jobs and the work that you do with the Westinghouse Company in a missionary way. You might feel that you ought to be compensated for your efforts with the Westinghouse Company on jobs such as these two. In our opinion Charles Rapp would have bought Security or Richmond doors on both of these jobs had his hands not been tied by the efforts of Arthur Otis in Detroit.

"Due to the fact that you asked for a commission on these jobs you undoubtedly feel that you ought to be compensated in some way for the missionary work that you do with Westinghouse in Chicago. This work in our opinion is partly compensated for by the expense that The Peelle Company pays for the Chicago Office organization which is at your disposal. Furthermore, you have to contact Westinghouse anyway for possible jobs in your own territory.

"Due to the fact that the West Michigan Dock and Warehouse job was taken at a ridiculous price has nothing to do with the issuing of commissions so far as you are concerned. We would be very lucky to break even on this job. Of course, the Detroit-Edison job is not so bad, and we expect to make a small profit on it. We can give you a small nominal commission on the Detroit-Edison job, but this commission in no way has reduced Arthur Otis' commission, but is reducing the anticipated profit that the Peelle Company hopes to make on this job.

"We have credited your account with Twenty-five ($25.00) Dollars commission which is a nominal amount and is not figured on any percentage basis."

Plaintiff testified that there was no correspondence or communication of any kind between the parties with regard to commissions on either of these jobs subsequent to August 25, 1933, the date of the letter just above quoted. The contract price of the Michigan Dock and Warehouse job was 32% less than the list price.

These contracts were made at greatly reduced prices. When plaintiff was advised by defendant that these orders were procured by the Detroit agency and that the purchase price in each instance was so low as not to justify the payment of any commission to plaintiff, but that he would be allowed "a small nominal commission" on the Detroit-Edison job, plaintiff made no protest nor did he dispute the amount of commission allowed and paid him.

CONTINENTAL CAN COMPANY
SEATTLE, WASHINGTON.

This contract was obtained by defendant through its San Francisco agent in 1933. The contract price was $1,925 less 10%. Although he did not procure this order plaintiff claims that he was

from the Washington Company. In saying this I do not want to detract in any way from the work that you did with Charles Hays on these two jobs and the work that you do with the Washington Company in a satisfactory way. You might feel that you could be compensated for your efforts with the Washington Company on jobs such as these two. In our opinion Charles Hays would have bought Security or Diamond Stove on back of these jobs had his hands not been tied by the efforts of Arthur Otis in Detroit.

"Due to the fact that you asked for a consultation on these jobs you undoubtedly feel that you might be compensated in some way for the missionary work that you do with Washington in Chicago. This work in our opinion is partly compensated for by the expense that the Peoples Company pays for the Chicago office organization which is at your disposal. Furthermore, you have a contract Washington supply for possible jobs in your own territory.

"Due to the fact that the West Michigan Dock and Warehouse job was taken at a ridiculous price has nothing to do with the issuing of commissions so far as you are concerned. We would be very likely to break even on this job. Of course, the Detroit-Edison job is not so bad, and we expect to make a small profit on it. We can give you a small nominal commission on the Detroit-Edison job, but this commission in no way has reduced Arthur Otis' commissions, but is reducing the anticipated profit that the Peoples Company hopes to make on this job.

"We have credited your account with Twenty-five ($25.00) Dollars commission which is a nominal amount and is not figured on any percentage basis."

Plaintiff testified that there was no correspondence or communication of any kind between the parties with regard to commissions on either of these jobs subsequent to August 25, 1922, the date of the letter just above quoted. The contract price of the Michigan Dock and Warehouse job was 32% less than the list price.

These contracts were made at greatly reduced prices.

When plaintiff was advised by defendant that these orders were procured by the Detroit agency and that the purchase price in each instance was so low as not to justify the payment of any commission to plaintiff, but that he would be allowed "a small nominal commission" on the Detroit-Edison job, plaintiff made no protest nor did he dispute the amount of commission allowed and paid him.

MATERIAL CAN COMPANY
MATTER, WASHINGTON.

This contract was obtained by defendant through the Peoples agent in 1922. The contract price was $1,925 less 10%, although he did not procure this order plaintiff claims that he was

entitled to commission on this transaction because his efforts in contacting the Chief Engineer of the Conintental Can Company, whose office is in Chicago, were instrumental in securing the contract. He was paid $39 commission but now insists that he is entitled to a commission of 5% or $96.25 and claims that there is a balance of $57.25 due him.

On August 23, 1933, defendant wrote plaintiff:

"We are crediting your account with thirty-nine ($39) Dollars commission on this job.

"A copy of our manufacturing order is enclosed for your files."

There were no further communications or conversations between the parties with respect to the award of commission on this transaction. The net contract price in this instance was 24% less than list price.

This purchaser was a "National user" and the contract was made at a reduced price. Prior to the commencement of this action plaintiff did not dispute the amount of commission allowed and paid him.

CONTINENTAL CAN COMPANY
SAN JOSE, CALIFORNIA.

This contract was also obtained by defendant through its San Francisco agent in 1933. The contract price was $3,792 less 10%. Plaintiff testified that his activities with respect to this transaction were substantially the same as they were in the preceding transaction in connection with the Continental Can Company building in Seattle. He was paid $75 commission but claims that he is entitled to a commission of 5% on the net contract price or $170.64, and that there is a balance due him of $95.64. Concerning this order defendant wrote plaintiff on August 23, 1933:

"We have credited your account with Seventy-five ($75.00) Dollars commission on the above job.

"A copy of our manufacturing order is enclosed for your files."

Plaintiff testified that he could not remember whether there was any correspondence or conversation between the parties relative to this transaction subsequent to August 23, 1933, the date of the foregoing letter. The net contract price was 20% less than defendant's list price.

entitled to commission on this transaction because this effort in contacting the chief engineer of the Continental Company, who resides in Chicago, were instrumental in securing the contract. He was paid $39 commission but now insists that he is entitled to a commission of 3% or $96.27 and claims that there is a balance of $57.27 due him.

On August 21, 1931, defendant wrote plaintiff:

"We are crediting your account with Thirty-nine ($39) Dollars commission on this job.

"A copy of our manufacturing order is enclosed for your files."

There were no further communications or conversations between the parties with respect to the award of commission on this transaction. The net contract price in this instance was 2% less than list price.

This purchaser was a "National user" and the contract was made at a reduced price. Prior to the commencement of this action plaintiff did not dispute the amount of commission allowed and paid him.

CONTINENTAL CAN COMPANY
San Jose, California.

This contract was also obtained by defendant through its San Francisco agent in 1933. The contract price was $3,792 less 10%. Plaintiff testified that his activities with respect to this transaction were substantially the same as they were in the preceding transaction in connection with the Continental Can Company building in Seattle. He was paid $75 commission but claims that he is entitled to a commission of 3% on the net contract price or $107.64, and that there is a balance due him of $32.64. Concerning this order defendant wrote plaintiff on August 23, 1933:

"We have credited your account with Seventy-five ($75.00) Dollars commission on the above job.

"A copy of our manufacturing order is enclosed for your files."

Plaintiff testified that he could not remember whether there was any correspondence or conversation between the parties relative to this transaction subsequent to August 23, 1933, the date of the letter quoting letter. The net contract price was 2% less than customer's list price.

This purchaser was a "National user" and the contract was made at reduced price. The amount of commission allowed and paid plaintiff was at no time disputed prior to the commencement of this action.

UNITED STATES APPRAISERS STORE
CHICAGO, ILLINOIS.

This contract was obtained by plaintiff in 1932 at a net contract price of $17,500, on which he claims a commission of 10% or $1,750. He received from defendant tax warrants of the City of Chicago in the face amount of $600 and now claims a balance due of $1,150. As to this transaction plaintiff wrote defendant on October 3, 1932:

"Enclosed herewith please find contract from the Otis Elevator Co. covering doors for the above building, price as per your quotation to Washington office of the Otis Elevator Co.

"We will furnish elevator layouts and manufacturing data at a later date."

On the same date plaintiff also wrote defendant:

"I am today sending you the order for the Chicago Appraisers Stores. I realize that the job is taken at a low price, and I want to ask that you personally look into the cost of same and see if you can possibly allow me regular commission on the job. I have been going along and sticking to the ship and will continue to do so as long as possible, but I am getting to the point where I am going to need help, and if I can get regular commission on this job I will be able to get by until next Spring, with a few breaks."

Defendant wrote plaintiff under date of October 18, 1932:

"In reply to your letter of October 3rd with reference to your question of commission allowance on the job.

"Since my return I have not had time to delve into the set up on this job, but I have spent most of this afternoon in analyzing the price and breaking same into costs, and it is a sorry, sick-looking mess.

"Under reduced costs of overhead labor and material, this net contract price represents $17,500, which is exactly 50% under list price. Figuring every economy possible on the job, and putting the erection labor cost not to exceed $2,000, which you can figure is indeed very low, the job will lose us in cold dollars, being erected under present cost conditions, exactly $3,850, not allowing for any commissions. This is the lowest price at which we have accepted any government work to date, and let me tell you it will be the last.

"So far as any commission set up for you on this job is concerned, it is simply out of the question before we spend the money to execute the job to its entirety. The worst contingency we have in performing these jobs, of course as you know, is in the field. If you and Mr. Jackson can manage to put this job through not to exceed a cost

This petitioner was a "Tedious work" and the contract was made at reduced price. The amount of commission allowed and paid plaintiff was at no time disputed prior to the commencement of this action.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, ILLINOIS.

This contract was obtained by plaintiff in 1932 at a net contract price of $17,500, on which he claims a commission of 15% or $1,750. He received from defendant ten warrants of the City of Chicago in the face amount of $500 and now claims a balance due of $1,250. As to this transaction plaintiff wrote defendant on October 3, 1932:

"Enclosed herewith please find receipt from the City Director to covering doors for the above building, prior to per your quotation to building office of the city Director co.

"We will furnish showcase layouts and specifications at a later date."

On the same date plaintiff also wrote defendant:

"I am today sending you the order for the Chicago Department stores, realize that the job is taken at a low price, and I want to say you personally look into the cost of same and see if you can possibly allow us regular commission on the job. I have been going along and attention to the ship and will continue to do so as long as possible, but I am getting to the point where I am going to need help, and if I can get regular commission on this job I will be able to get by until next Spring, with a few breaks."

Defendant wrote plaintiff under date of October 12, 1932:

"In reply to your letter of October 3rd with reference to your question of commission allowance on the job.

"Since my return I have not had time to delve into the matter up on this job, but I have spent most of this afternoon in analyzing the price and breaking same into costs, and it is a sorry, sick-looking mess.

"Under removed costs of overhead labor and material, this our company price represents $17,700, which is exactly 200 under list price. Figuring every minutes possible on the job, and putting the selection value cost not to exceed $1,000, which you can figure is indeed very low, the job will have us in well dollars, being entered under present cost conditions, exactly $1,250, not allowing for any commissions. This is the lowest price at which we have accepted any government work to date, and let me tell you it will be the last.

"So far as my knowledge goes so far you on this job is concerned, it is simply out of the question before we could the money to execute the job to its entirety. The worst contingency we have in performing these jobs, of course as you know, is in the field. If you and Mr. Jackson can manage to put this job through not to exceed a cost

of $2,000 at the most, I would agree at this particular time to make you an allowance of $500, and that is the very best I can tell you to date on the job. Of course, it is not our purpose to throw back any responsibility on you, but I am merely giving you the details of the analysis so that you can judge the matter of our commission allowance for yourself.

"Were this the only job we had on our books, and had the rest of the business booked this year been on much higher price levels than we have been able to obtain, I would have no hesitancy in making you a better allowance; but what is the use of telling you that we will make you any allowance on this or any other job when we know that the price and costs will not yield same.

"This is one job that we would be much better off without than with."

On October 20, 1932, plaintiff replied to defendant as follows:

"Your letter of the 18th regarding the above has just taken the heart out of the writer, I was figuring on getting at least a thousand dollars, in cash at this time, try and imagine my feelings after reading your letter. As I told you in my last letter that I was stalling off the landlord and the grocer, until I heard from you. I have not paid my house rent or grocer for the last three months, and unless I can pay up these bills, I will not be able to eat and will be moved out of my apartment on the street. You can appreciate my position.

"I have got to get some money, quick, and if you will send me your check for Five Hundred Dollars commission on this job now, so that I can pay the landlord and grocer, I will be perfectly willing to accept same as final commission on this job. If you do not have the cash and will send me Seven Hundred Fifty Dollars in tax warrants that you have I will be able to discount them and get the money this way. The present market on the warrants is 75%.

"As far as cost of the job I appreciate that it was taken at a very low price, and as Richmond quoted a price of Sixty-four Hundred Dollars to Westinghouse, I presume that you can buy the doors from them for a price of Six Thousand Dollars, this would leave you Eleven Thousand Five Hundred Dollars for furnishing the car gates and operator, which would be a fair price, and ought to allow you to make some money.

"You have my assurance that I will do everything possible to get the job installed at the lowest possible dollar. You know that I have always had the best interests of the Peelle Company at heart and will continue to do so, but I will have to appeal to you, to help me out now and I know that you will not fail me at this time."

On October 25, 1932, defendant replied:

"I have your letter of October 20th with reference to the commission on the above job.

"I am very sorry that our allowance on this job was disheartening, and I assure you that we would have been glad to allow you $1,000 if it were at all possible.

"We do not have the money to advance the commission at this time, but are willing to send you some of the Chicago Tax Warrants. This will be taken care of tomorrow, as our head bookkeeper is away from the office today, and she has the securities locked up in the safe."

of $2,000 at the most, I would agree at this particular time to make you an allowance of $300, and that is the very best I can tell you to date on the job. Of course, it is not our purpose to throw back any responsibility on you, but I am merely giving you the details of the analysis so that you can judge the matter of your allowance for yourself.

"Were this the only job we had on our books, and had the rest of the business needed this year been on such a lower price level than we have been able to obtain, I would have no hesitancy in making you a better allowance; but what is the use of telling you that we will make you any allowance on this or any other job when we know that the price and costs will not yield same.

"This is one job that we would be much better off without than with."

On October 20, 1932, plaintiff replied to defendant as follows:

"Your letter of the 15th regarding the above has just taken the heart out of the writer. I was counting on getting at least a thousand dollars in cash at this time, by and begins by feeling after reading your letter. As I told you in my last letter that I was staying off the landlord and grocer until I hear from you. I have not paid my house rent or groceries for the last three months, and unless I can pay up these bills, I will not be able to eat and will be moved out of my apartment on the street. You can appreciate my position.

"I have got to get some money quick, and if you will send me your check for five hundred dollars commission on this job now, so that I can pay the landlord and grocer, I will be perfectly willing to accept same as final commission on this job. If you do not have the cash and will send me seven hundred fifty dollars in lieu thereof that you have I will be able to discount them and get the money this way. The present market on the warrants is 75%.

"As far as cost of the job I appreciate that it was taken at a very low price, and as Hickman quoted a price of fifty-four hundred dollars to Westinghouse, I presume that you can pay the more from them for a price of six thousand dollars, this would leave you eleven thousand five hundred dollars for furnishing the car gates and operator, which would be a fair price, and ought to allow you to make some money.

"You have my assurance that I will do everything possible to get the job installed at the lowest possible dollar. You know that I have always had the best interests of the Wells Company at heart and will continue to do so, but I will have to appeal to you, to help us out now and I know that you will not fail me at this time."

On October 25, 1932, defendant replied:

"I have your letter of October 20th with reference to the commission on the above job.

"I am very sorry that our allowance on this job was disappointing, and I assure you that we would have been glad to allow you $1,000 if it were at all possible.

"We do not have the money to advance the commission at this time, but are willing to send you some of the Chicago Bar warrants, this will be taken care of therefore, at our head bookkeeper is away from the office today, and she has the securities locked up in the safe."

On October 26, 1932, defendant wrote plaintiff as follows:

"We are enclosing $600 in Chicago Tax Anticipation Warrants (12 certificates, $50 each, numbers 32151 through 32162 inclusive).

"Of course, you understand that we are taking a loss also on these securities by allowing you to use them at this time, so it seems that the amount of $600 is a fair settlement.

"We will credit your account for this amount in full for commission on this job."

Thereafter on December 22, 1932, defendant furnished plaintiff with a statement of account showing commissions awarded on various jobs, including an item as to the commission on this contract, and showing that same was paid in tax warrants in the amount of $600.

This contract was made at a reduced price. Plaintiff wrote defendant that he realized "that the job is taken at a low price" and requested it to "see if you can finally allow me regular commission on the job." He later wrote that he would be willing to accept $500 in cash or $750 in tax warrants as final commission on the job. Thereafter, when defendant forwarded to plaintiff $600 in Chicago tax anticipation warrants as "a fair settlement," plaintiff accepted same without further question as his award of commission on this transaction.

HIRAM WALKER & SONS
PEORIA, ILLINOIS.

This contract was obtained in 1933 at a net price of $14,356.40. Plaintiff claims that he was entitled to 10% commission or $1,435. He received $662.50 and claims there is a balance due him of $773.14. On December 4, 1933, defendant wrote plaintiff:

"We acknowledge your letter dated November 24th with which you enclosed Otis Elevator Company's formal order on the above job in the net amount of $14,356.40.

"Our total list price on the job is $18,925 *** This list price does not take into consideration the special explosion proof equipment which will have to be furnished on the Bottling Plant doors.

"The net price figures 23% below book list, and produces a total commission of $1,325, which we have split evenly between your office and the Detroit Office, or $662.50 each.

"Although the job is located in your territory, it was opened and closed in Detroit, and therefore one-half of the commission is going to Detroit for opening and closing the job, and one-half of the commission is going to you because the job is located in your territory."

On October 26, 1932, defendant wrote Plaintiff as follows:

"We are enclosing $600 in Chicago Gas Utility System Bonds (12 certificates, $50 each, numbers 321-32 through 7810 inclusive).

"Of course, you understand that we are buying a lot of stock on these securities by allowing you to use them at this time, so it seems that the amount of $600 is a fair settlement.

"We will credit your account for this amount in full for consideration on this job."

Thereafter on December 22, 1932, defendant furnished plaintiff with a statement of account showing commissions awarded on various jobs, including an item as to the commission on this contract, and showing that same was paid in tax warrants in the amount of $600.

This contract was worth it a reduced price. Plaintiff wrote defendant that he realized "that the job is taken at a low price" and requested it to "see if you can finally allow me regular commission on the job." He later wrote that he would be willing to accept $250 in cash or $250 in tax warrants as final commission on the job. Thereafter, when defendant tendered to plaintiff $600 in Chicago tax anticipation warrants as "fair settlement," plaintiff accepted same without further question as his share of commission on this transaction.

THIRD CONTRACT & CLAIM
FORMAL INVOICE.

This contract was obtained in 1933 at a net price of $14,320.40. Plaintiff claims that he was entitled to his commission of $1,432. He received $600.00 and claims there is a balance due him of $832.40. On December 4, 1933, defendant wrote plaintiff:

"We acknowledge your letter dated November 24th with which you enclosed Otis Elevator Company's formal order on the above job in the net amount of $14,320.40.

"Our total list price on the job is $18,912 net. This list price does not take into consideration the special emplosion proof equipment which will have to be furnished on the Bottling Plant floor.

"The net price figures 32% below book list, and produces a total consideration of $1,432, which we have split evenly between your office and the Detroit office, or $716.20 each.

"Although the job is located in your territory, it was opened and closed in Detroit, and therefore one-half of the commission is going to Detroit for opening and closing the job, and one-half of the commission is going to you because the job is located in your territory."

Plaintiff wrote defendant on December 7, 1933:

"I am in receipt of Paul Saurer's letter of the 4th, in which he advises me, that I will have to split my commission, on the above with the Detroit office, because the job was opened and closed in Detroit.

"The way I figure the prices including 20% added to the frame price, is $8,187 for the doors in the Bottling Works, and your wire to me on wire mesh gates was $9,700 including Type B interlocks, for each door, and when this was changed to Master type interlocks, you reduced your price to $8,736, making the total cost of the job list price $16,923 Dollars, and the order was secured at a net price of $14,356.40 which is about 15% under list prices, and should allow regular commissions.

"I am entitled to full 10% because the job was opened and closed in Chicago and located in my territory, and the wire mesh doors were secured through my efforts entirely, and the price we secured was because of the arrangement I had with Security Co. to keep them from cutting the price.

"In view of the above facts, I trust you will send me check covering 10% commission on the total amount of the contract."

On December 11, 1933, defendant wrote plaintiff:

"Although you may have done some work on the job in Chicago, our records prove that the job was absolutely opened and closed in Detroit by Mr. Arthur Otis. Mr. Otis worked very hard to sell the gates against the competition of the Otis Elevator Company who had in a price of $4,000 for wooden safety gates. ***

"The correct list price for these gates is $8,640, so you see at the price per unit, your price of $8,736 is not correct for the gates. We will not make anything on these gates. We were glad to get the volume of business of course, to help carry overhead expenses. Aside from this, we have to furnish vapor and explosion proof materials which were not figured in the original estimates.

"When we set up the commission on the job, I thought we made a very liberal allowance considering the price at which we obtained the entire contract, and in place of the price being 15% under list as you state, it is actually 23% under list.

"Our present contract with you provides for one-half of the commission on any job in your territory that is closed outside of the territory by other Peelle represenatives. We have the same form of contract with Mr. Otis, and therefore we have no other alternative than to pay you one-half of the commission and Mr. Otis one-half of the commission. I am enclosing herewith our check for $662.50, representing half of the commission set-up, which I trust you will accept without any further argument, as this is all we can legally pay you on this particular job.

"Also, do not forget that you are getting commission on the iron frames and sills which should really have been taken out of the job as that part of the work is being done outside of our plant and there is nothing in it for us."

On December 13, 1933, plaintiff wrote defendant:

"Your letter of the 11th received enclosing check for $662.50 which you tender for full commission on the above job, I will not accept this check for full commission on the above job, and will

Flaherty wrote Hermann on December 1, 1944

"I am in receipt of Vail Company's letter of the 4th, in which he advises me, that I will have to split my commission, on the above with the Detroit office, because the job was opened and closed in Detroit.

"The way I figure the price including the added to the frame price, is $2,107 for the doors in the Rotating Tower, and your share to me on six such prices was $1,264 including type 2 interlocks, for each door, and when this was changed to further type interlocks, you reduced your price to $1,[illegible], making the total cost of the job list price $16,923 Dollars, and the order was received at a net price of $14,336.40 which is about 15% under list prices, and should allow regular commissions.

"I am entitled to full 10% because the job was opened and closed in Chicago and located in my territory, and the six such doors were secured through my efforts entirely, and the price we secured was because of the arrangement I had with Security Co. to keep them from cutting the price.

"In view of the above facts, I trust you will send me check covering 10% commission on the total amount of the contract."

On December 12, 1944, defendant wrote Flaherty

"Although you may have done some work on the job in Chicago, our records prove that the job was absolutely opened and closed in Detroit by our Detroit office. So, this order only had to call the plan against the competition of the Otis Elevator Company who had in a price of $4,000 for wooden safety gates. ***

"The correct list price for these gates is $8,000, as you see at the price per unit, your price of $1,[illegible] is not correct for the gates. We will not make anything on these gates. We were glad to get the volume of business of course, in fact very overjoyed expenses. Aside from this, we have to furnish vapor and explosion proof materials which were not figured in the original estimates.

"When we set up the commission on the job, I thought we made a very liberal allowance considering the price at which we obtained the entire contract, and in place of the price being 15% under list as you state, it is actually 23% under list.

"Our present contract with you provides for one-half of the commission on any job in your territory that is closed outside of the territory by other Peelle representatives. We have the same form of contract with Mr. Cole, and therefore we have no other alternative than to pay you one-half of the commission and Mr. Cole one-half of the commission. I am enclosing herewith our check for $662.50, representing half of the commission which, which I trust you will accept without any further argument, as this is all we can legally pay you on this particular job.

"Also, do not forget that you are getting commission on the iron frame and this which should really have been taken out of the job as this part of the work is being done outside of our plant and there is nothing in it for us."

On December 15, 1944, plaintiff wrote defendant:

"Your letter of the 12th received enclosing check for $662.50 which you denote for full commission on the above job. I will not accept this check for full commission on the above job, and will

hold same until you send me a check for balance due me, in accordance with my contract.

"The question to be decided is who opened and closed this contract, and/as we can not agree on this point, it is evident that we will have to get some one, to decide for us, unless you decide to send me your check for the balance, due me on this contract."

In response to this letter defendant wrote plaintiff on December 15, 1933:

"We cannot agree with you that the job was opened and closed in Chicago. We feel that Arthur Otis has a just claim to one-half of the commissions.

"I personally would urge you to accept the check in full settlement for your share of the commission on the job, as I am quite sure that in accordance with the facts and circumstances surrounding the opening and closing of the job that a Court of Equity would approve of the equal division of the commission between you and Mr. Otis.

"If you want, and you do not think John Pottage would be biased, you might ask him for an opinion in the matter. I further suggest that if you want, you take your contract to any attorney in Chicago and get his opinion.

"You will please understand that it is not our purpose in any way whatsoever to take any commissions from you that rightfully belong to you. On the other hand, we feel that it is only right to pay Mr. Otis his proportionate share, in accordance with the contract with the Peelle Company.

We cannot agree with you that you have not been paid commissions on the jobs that were placed outside of the Chicago territory, and in many cases we have paid you commissions where the jobs have been absolutely sold outside of your territory. Take for instance the last two Continental Can Company contracts in California. You were compensated with commission on these two jobs at the cost of our California agent because the headquarters of the Continental Can Company happen to be in Chicago. These jobs were really closed here in New York through the efforts of Mr. H. E. Peelle and Mr. Harry Bates of the Otis-New York Office. These are only two late jobs of several jobs on which you have been paid commissions that were contracts outside of your territory."

On December 18, 1933, plaintiff wrote defendant:

"In reply to yours of the 15th regards to settlement of the commission on the above job, I can not agree with you that this job was either opened or closed in Detroit, and I will not accept the check you sent me for full settlement.

"I trust that you will consider this matter from all angles, and that you will decide to mail me your check for the balance due me on this contract, as it will save us both a lot of time and expense."

Thereafter, on January 2, 1934, defendant wrote plaintiff:

"We have had a directors' meeting today, and your letter was placed before the directors for consideration. In the meantime the matter has been placed before our counsel by one of the other officers of the company, who advises that in strict accordance with the terms of the contract, and inasmuch as we have by that contract the reservation or right to adjust commissions where outside influence

hold same until you send me a check for balance due me, in accordance with my contract.

"The question to be decided is who opened and closed this contract, and we can not agree on this point. It is evident that we will have to get some one, to decide for us, unless you decide to send me your check for the balance, due me on this contract."

In response to this letter defendant wrote plaintiff on December 15, 1933:

"We cannot agree with you that the job was opened and closed in Chicago. We feel that Arthur Otis has a just claim to one-half of the commissions.

"I personally would urge you to accept the check in full settlement for your share of the commission on the job, as I am quite sure that, in accordance with the facts and circumstances surrounding the opening and closing of the job that a court of equity would approve of the equal division of the commission between you and Mr. Otis.

"If you want, and you do not think John Pottage would be biased, you might ask him for an opinion in the matter. I further suggest that if you want, you take your contract to any attorney in Chicago and get his opinion.

"You will please understand that it is not our purpose in any way whatsoever to take any commissions from you that rightfully belong to you. On the other hand, we feel that it is only right to pay Mr. Otis his proportionate share, in accordance with the contract with the realle Company.

We cannot agree with you that you have not been paid commissions on the jobs that were placed outside of the Chicago territory, and in many cases we have paid you commissions where the jobs have been successfully sold outside of your territory. This for instance the last two Continental Can Company contracts in California. You were responsible with connection on these jobs at the cost of our California agent because the headquarters of the Continental Can Company happen to be in Chicago. These jobs were really closed here in New York through the efforts of Mr. R. A. Poelle and Mr. Harry Peter of the New York office. These are only two late jobs of several jobs on which you have been paid commissions that were contracts outside of your territory."

On December 18, 1933, plaintiff wrote defendant:

"In reply to yours of the 15th regards to settlement of the commission on the above job, I can not agree with you that this job was either opened or closed in Detroit, and I will not accept the check you sent me for full settlement.

"I trust that you will consider this matter from all angles, and that you will decide to mail me your check for the balance due me on this contract, as it will save us both a lot of time and expense."

Thereafter, on January 2, 1934, defendant wrote plaintiff:

"We have had a directors' meeting today, and your letter was placed before the directors for consideration. In the meantime the matter has been placed before our counsel by one of the other officers of the company, who advises that in right according with the terms of the contract, and therefore as we have by that contract the interpretation of right to adjust commissions where outside influence

has helped in closing a contract, that the division of the commission in this case, in his opinion, is correct, and our directors cannot alter the commission set-up.

"We notified Mr. Otis at the time we wrote you regarding the commission set-up, and he will expect to receive his share of the commission. So, I suppose George, you will have to litigate the matter, in which case I do not believe you can win. Remember that attorneys do not always give you correct advice, and it might cost you a couple of hundred dollars for attorney's fees only to lose the case.

"It now remains a matter for you to decide as to what you want to do. I personally would like to know what the legal or court decision would amount to, as we have had this question up many times in the past with various agents, but so far we have never had a court case."

This transaction will be considered later but it should be noted in passing that plaintiff did not in this instance, as he did not in any of the other transactions, question defendant's right to make an equitable division or award of commission where the facts brought the transaction within the scope of any of the reservations, but here he claimed that its division of the commission was unfair and inequitable in that none of the reservations were applicable.

In considering the issues presented for our determination, we are immediately confronted with the question as to the proper construction to be given the agency contract. Is the meaning of the language employed therein as to the manner in which plaintiff's commissions were to be determined sufficiently clear and certain in and of itself to disclose the purpose and intent of the parties without resort to extrinsic facts and circumstances? The contract provided that on sales "opened and closed" by plaintiff for the installation of defendant's products within his own territory he was to receive 10% commission, that on sales closed by him for defendant's products to be installed outside his territory he was to receive 5% commission and that on sales closed by others for defendant's products to be installed in buildings located within his territory he was to receive 5% commission, but it further provided that plaintiff would be furnished with price lists in accordance with which he would quote prices and accept contracts. It then contained the reservation that, if an outside office "has been influential in closing the sale," defendant had the right to make an equitable division of the commission, and, if a contract was closed at a reduced price, defendant had the right to make an equitable award of commission. There was the further reservation that selling prices were not to be quoted by plaintiff to "National users" until they had been first determined by defendant and that commissions on orders from "National users" would be awarded at the time the sales were made and would vary "as conditions demand." There can be no question but that it was clearly intended by the parties that the stipulated percentages of commission to be allowed were restricted by and subject to the reservations where the facts brought the particular contract within the scope of any of such reservations. While all of the transactions under consideration, with the possible exception of the Hiram Walker & Sons Company contract came within the scope of

has helped in closing a contract, that the division of the commission in this case, in his opinion, is correct, and our directors cannot alter the commission set-up.

"We notified Mr. Hill at the time we wrote you requesting the commission set-up, and he did not request us to change his share of the commission. ... I suppose further, you will have to litigate the matter, in which case I do not believe you can win. Remember that attorneys do not always give you correct advice, and it might cost you a couple of hundred dollars for attorney's fees only to lose the case.

"If you remember a matter for you to decide as to what you want to do, I personally would like to know what the legal or court decision would amount to, as we have had this question up many times in the past with various agents, but as far as I know never had a court case."

This transaction will be considered later but it should be noted in passing that plaintiff did not in this instance, as he did not in any of the other transactions, question defendant's right to make an equitable division or award of commission where the facts brought the transaction within the scope of any of the reservations, but here he claimed that its division of the commission was unfair and inequitable in that none of the reservations were applicable.

In considering the issues presented for our determination, we are immediately confronted with the question as to the proper construction to be given the agency contract. In the wording of the language employed therein as to the manner in which plaintiff's commissions were to be determined sufficiently clear and certain in and of itself to disclose the purpose and intent of the parties without resort to extrinsic proofs and circumstances. The contract provided that on sales "opened and closed" by plaintiff for the installation of defendant's products within his own territory he was to receive full commission, but on sales closed by him for defendant's products to be installed outside his territory he was to receive 3% commission and that on sales closed by others for defendant's products to be installed in territory located within his territory he was to receive 3% commission, but if further provided that plaintiff would be furnished with price lists in accordance with which he would quote prices and accept contracts. If then considered the reservation that, if on certain orders "was been instrumental in closing the sale," defendant and the right to make an equitable division of the commission, but, if a contract was closed at a reduced price, defendant had the right to make an equitable award of commission. There was the further reservation that selling prices were not to be quoted by plaintiff to "National Agents" unless they had been first determined by defendant and that commissions on orders from "National Agents" would be awarded at the time the sales were made and would vary "as conditions demand." There can be no question but that it was clearly intended by the parties that the stipulated percentages of commission to be allowed were regulated by and subject to the reservations where the facts brought the particular contract within the scope of any of such reservations. While all of the transactions under consideration, with the possible exception of the Ultra Mixer & Iron Company contract came within the scope of

one or more of the reservations, it is by no means true that these transactions constituted all of the sales of defendant's products made by plaintiff during the life of the contract. Such sales as were made by him which were not "at reduced prices," not to "National users" and where an outside office had not been influential in closing the sale would necessarily be governed as to commission solely by the rates stipulated in the contract. Plaintiff expressly agreed to the reservations, which, we think, were reasonable under all of the circumstances, and he should be bound by them.

In our opinion the language employed in the agency contract is plain, understandable English and its meaning is clear. The contract gave defendant the right to make an equitable division or award of commission to plaintiff, as the case might be, if any of the conditions existed as specified in the reservations. Where the meaning of the language employed in a written contract is sufficiently clear and certain in and of itself to disclose the purpose and intention of the parties without resort to extrinsic facts and circumstances, the construction of the contract is purely a matter for the court.

But it is insisted that the provisions of the contract are ambiguous. Let us assume they are. "Where the terms of the agreement are in any respect ambiguous and the parties by their own acts placed a reasonable construction upon them, their interpretation will be adopted by the court." Chicago Daily News v. Kohler, 360 Ill. 351. It appears conclusively from the undisputed facts and circumstances heretofore set forth that plaintiff recognized defendant's right under the reservations in the agency contract to make such equitable division or award of commission as the circumstances of each of the transactions warranted and that defendant proceeded to exercise that right. As has been shown the purchase orders in at least the first sixteen of these transactions came within the scope of one or more of the reservations. It is true that plaintiff did protest for a time against the amount of commission allowed him in several of the transactions, but it is also

one or more of the reservations, it is by no means true that these transactions constituted all of the sales of defendant's products made by plaintiff during the life of the contract. Such sales as were made by him which were not "at reduced prices," not to "National users" and where an outside office had not been influential in closing the sale would necessarily be governed as to commission solely by the rates stipulated in the contract. Plaintiff expressly agreed to the reservations, which, we think, were reasonable under all of the circumstances, and he should be bound by them.

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true that after the circumstances were explained to his satisfaction, he abandoned his protests and accepted the commissions awarded and paid him as fair and equitable allowances. The entire course of dealing between the parties makes it perfectly obvious that plaintiff acknowledged defendant's right to make an equitable award of commission in the individual transactions, if any of the conditions mentioned in the reservations existed.

What could be more significant as to plaintiff's understanding of the effect of the reservations than his written declarations concerning same? Did he consider the provision of his agency contract as to stated percentages of commission absolutely controlling when, in connection with the United States Post Office, Mason City, Iowa, transaction, he wrote defendant "I don't object to cutting my commission when we have to cut our price?" This statement certainly reflected his recognition of the reservation as to sales made at reduced prices. In connection with the same transaction plaintiff recognized the effect on the stipulated rates of commission of sales made where the reservation "where an outside office has been influential in closing the sale" was applicable, when he wrote defendant, "In reply to your letter of July 6, we note that Mr. Bright is being credited with 2-1/2% commission on all Government jobs and we agree with you that he is entitled to this commission. Had you given us this explanation when you sent through the manufacturing order on this job we would not have questioned it." That plaintiff also fully appreciated and recognized the effect on the provisions of his contract for stated percentages of commission of the reservation as to sales to "National users" is seen in his correspondence with defendant in connection with the American Can Company, Clybourne Avenue, transaction, where, after defendant had written him "hereafter on American Can Co. orders do not figure any more than 5% for yourself due to the fact that considerable overhead expense is spent by the Peelle Company here in New York *** time and effort in holding the business *** it is really business in your territory that comes to you automatically without much effort on your part," he

tive that after the circumstances were explained to his satisfaction, he abandoned his protests and accepted the commissions rendered and paid him as fair and equitable allowances. The entire course of dealing between the parties makes it perfectly obvious that plaintiff acknowledged defendant's right to make an equitable award of commission in the individual transactions, if any of the conditions mentioned in the reservations existed.

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replied, "In reply to your letter of February 18, I want to thank you for allowing me a total of $300 commission on the above mentioned job. I appreciate the fact that the American Can Company's business costs money to sell; also the fact that they are helping to carry overhead expenses in the Chicago office." Even in the Hiram Walker & Sons Company transaction plaintiff did not question defendant's right to make an equitable division of the commission if the facts brought this sale within one of the reservations, but he did very vigorously protest that none of the reservations were applicable.

The evidence, particularly as to the practical performance of the contract by the parties, is undisputed and in our opinion it is consistent only with the construction that they both treated those paragraphs of Article III thereof providing for stipulated rates of commission as modified and restricted to the extent of the reservations contained in the last paragraph of Article III and the first paragraph of Article IV. We fail to find any evidence in the record bearing upon the construction of the contract which could fairly and reasonably be construed as sustaining the interpretation now contended for by plaintiff that the rates of percentage of commission stipulated were controlling in any event and not restricted by or subject to the reservations. "Where evidence as to surrounding circumstances and practical performance by the parties to a written contract is presented and examined by the court as an aid in the ascertainment of the proper construction to be given the instrument, if said evidence is uncontroverted, the function of interpretation remains with the court. It is only when the facts pertaining to the surrounding circumstances or concerning the practical performance by the parties are controverted that the interpretation of a contract must be submitted to the jury." Knowles F. & M. Co. v. National Plate Glass Co., 301 Ill. App. 128.

There was some conflict in the evidence as to whether the contracts for the installation of defendant's products in the Englewood and Clybourn avenue plants of the American Can Company were made at

replied, "In reply to your letter of February 16, I want to thank you for allowing me a total of $300 commission on the above mentioned job. I appreciate the fact that the American Can Company's business costs money to sell; also the fact that they are helping to carry overhead expenses in the Chicago office." Even in the Hiram Walker & Sons Company transaction plaintiff did not question defendant's right to make an equitable division of the commission if the factsbrought this sale within one of the reservations, but he did very vigorously protest that none of the reservations were applicable.

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There was some conflict in the evidence as to whether the contracts for the installations of defendant's products in the Hollywood and Cliffwood avenue plants of the American Can Company were made as

prices above or below the "list price." The president of the defendant company testified that both of these contracts were taken at reduced prices, but plaintiff testified that, according to computations made by him at about the time of the respective transactions, the prices secured were above the list prices. Plaintiff did not disclose such computations to defendant at the time he was awarded his commission on these jobs and it is rather difficult to account for his failure to do so since the price secured on his sales had such an important bearing on his commissions. Regardless of the prices at which these jobs were secured, the American Can Company was a "National user" and contracts with it were subject to the reservation covering "National users." Furthermore, plaintiff accepted the commission awarded and paid him on the Englewood American Can Company job in full satisfaction of the commission due him. As to the Clybourne avenue American Can transaction, he wrote defendant "I want to thank you for allowing me a total of $300.00 commission."

Defendant asserts that in any event plaintiff is barred from recovery because there was an accord and satisfaction as to each of the seventeen transactions. In the view we take of the first sixteen transactions there was no question of accepting a lesser amount in payment of a larger amount claimed to be due, since ultimately there was no dispute as to the amount due after a satisfactory explanation had been made regarding the commission awarded in each of these transactions, and, therefore, the doctrine of accord and satisfaction was not applicable to the facts in these transactions. Although as has been heretofore stated, plaintiff did protest originally and even for a time repeated his protests against the amount of commission awarded him in some of the transactions, his protests were later abandoned and he expressly agreed to accept or acquiesced in the commission allowance made to him. As has been seen, in all of the transactions except the Hiram Walker & Sons Company order plaintiff either expressly agreed that the commission awarded and paid him was fair and equitable or acquiesced in the fairness of the amount allowed and paid.

prices above or below the "list price." The president of the defendant company testified that both of these contracts were taken at reduced prices, but plaintiff testified that, according to computations made by him at about the time of the respective transactions, the prices secured were above the list prices. Plaintiff did not disclose such computations to defendant at the time he was awarded his commission on these jobs and it is rather difficult to account for his failure to do so since the jobs secured on his sales had such an important bearing on his commissions. Regardless of the prices at which these jobs were secured, the American Can Company was a "National user" and contracts with it were subject to the preferential contract "National users." Furthermore, plaintiff accepted the commission awarded and paid him on the Englewood American Can Company job in full satisfaction of the commission due him. As to the Glyndonite avenue American Can transaction, he wrote defendant "I wish to thank you for allowing me a total of $300.00 commission."

Defendant asserts that in any event plaintiff is barred from recovery because there was an express and mutual understanding as to price of the American transactions. In the view we take of the first claimed transactions there was no question of accepting a lesser amount in payment of a larger amount claimed to be due, since admittedly there was no dispute as to the amount due after a satisfactory explanation had been made regarding the commissions earned in each of these transactions, and, therefore, the doctrine of accord and satisfaction has not applicable to the facts in these transactions. Although as has been heretofore stated, plaintiff did protest originally and even for a time repeated his protests against the amount of commission awarded him in some of the transactions, his protests were later abandoned and he expressly agreed to accept or acquiesced in the commissions tendered made to him. In has been seen, in all of the transactions except the three Walker & Dunn Company order plaintiff either expressly agreed that the commission awarded and paid him was fair and equitable or acquiesced in the fairness of the amount allowed and paid.

In the Hiram Walker transaction, however, when defendant sought to make what it considered an equitable division of the commission between plaintiff and one Otis of its Detroit office, plaintiff strenuously disputed defendant's right to do so, claiming that he alone was responsible for opening and closing this sale for the installation of defendant's equipment within his own territory and was, therefore, entitled to the full 10% commission provided in the contract. It is unnecessary to pass upon the merits of the controversy in this regard since the undisputed evidence shows that there was an accord and satisfaction between the parties as to the commission due on this job. As heretofore shown, defendant awarded plaintiff $662.50 or one-half of the commission it allocated to this sale and plaintiff insisted on being paid the full 10%. On December 11, 1933, during the course of the somewhat protracted exchange of correspondence between the parties as to this transaction, defendant forwarded to plaintiff its check for $662.50, bearing on its face the notation, "in settlement of total commission on 33130, Hiram Walker job, $662.50." Upon the receipt of this check plaintiff wrote defendant, "Your letter of the 11th received enclosing check for $662.50, which you tendered for full commission on the above job. I will not accept this check for full commission on the above job and will hold same until you send me a check for balance due me, in accordance with my contract." Plaintiff held the check until January 10, 1934, when he cashed same and received the proceeds thereof. We here find all the elements present to bring the payment within the doctrine of accord and satisfaction. "It is not necessary that the debtor shall pay more in such a case than what he deems to be due, and if a check for such sum is offered in payment of a disputed account, it must be accepted by the creditor upon the terms upon which it is offered or must be rejected. If a check is offered under such circumstances as amount to a condition that it is to be received in full payment of the demand, an acceptance will satisfy the demand, although the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. An acceptance in such a case is an acceptance of the

In the Nova Scotia case, however, each attorney-
right to make what it considered an equitable division of the commis-
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strenuously disputed defendant's right to do so, claiming that he alone
was responsible for opening and closing this sale for the installation
of defendant's equipment within his own territory and, therefore,
entitled to the full 10% commission provided in the contract. It is
unnecessary to pass upon the merits of the controversy in this regard
since the undisputed evidence shows that there was an accord and satis-
faction between the parties as to the commission due on this job. As
heretofore shown, defendant awarded plaintiff $665.70 or one-half of the
commission it allocated to this sale and plaintiff indicated on being
paid the full 10%. On December 12, 1933, during the course of the corre-
spondence protracted exchange of correspondence between the parties as to this
transaction, defendant forwarded to plaintiff its check for $665.70,
bearing on its face the notation, "In settlement of total commission on
3139, Hiram Walker job, $665.70." Upon the receipt of this check plain-
tiff wrote defendant, "Your letter of the 11th received enclosing check
for $665.70, which you tendered for full commission on the above job. I
will not accept this check for full commission on the above job and will
hold same until you send me a check for balance due me, in accordance with
my contract." Plaintiff held the check until January 16, 1934, when he
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elements present to bring the payment within the doctrine of accord and
satisfaction. "It is not necessary that the debtor shall pay more in
such a case than what he deems to be due, and if a check for such sum is
offered in payment of a disputed account, it must be accepted by the
creditor upon the terms upon which it is offered or must be rejected. If
a check is offered under such circumstances as amount to a condition that
it is to be received in full payment of the claim, an acceptance will
satisfy the demand, although the creditor protests at the time that it is
not all that is due him or that he does not accept it in full satisfac-
tion of his claim. An acceptance in such a case is an acceptance of the

condition notwithstanding any protest he may make to the contrary." Snow v. Griesheimer, 220 Ill. 106. (To the same effect are Ostrander v. Scott, 161 Ill. 339; Lapp v. Smith, 183 id. 179; Canton Coal Co. v. Parlin & Orendorff Co., 215 id. 224; 1 Cyc. 229; 1 Am. & Eng. Ency. of Law, 2d ed. 419.) Since there was no dispute as to the facts upon which the claim of accord and satisfaction is based, "the greater weight of authority in this country, including Illinois, holds that the question of the creditor's assent is one of law to be determined by the court." Seidman v. Chicago Eye Shield Co., 267 Ill. App. 77.

Since the question of the construction of the contract was purely a matter of law for the court and since the question of accord and satisfaction was also for the court to determine on the undisputed facts, the court erred in submitting these questions to the jury. We are impelled to hold that the court should have directed a verdict for defendant at the close of all the evidence.

Such other points as have been urged have been considered, but in the view we take of this case further discussion would only unnecessarily prolong this already long opinion.

For the reasons stated herein the judgment of the Superior court is reversed.

JUDGMENT REVERSED.

Friend and Scanlan, JJ., concur.

countries notwithstanding any protest he may make to the contrary."
Ewer v. Hawkshaw, 220 Ill. 106. (To the same effect are Schmidt
v. Smith, 141 Ill. 339; Ewer v. Smith, 141 Ill. 339; Jordan and Co.
v. Jarvis & Crawford Co., 83 Ia. 284; 2 Sec. 483; 1 Ia. 4 Ann. Ency.
of Law, 2d ed. 419.) Since there was no dispute as to the facts upon
which the claim of account and satisfaction is based, "the proper weight
of authority in this country, including Illinois, holds that the question
of the creditor's assent is one of law to be determined by the court."
Hartman v. Chicago Car Equip. Co., 207 Ill. 419, 427.

Since the question of the correctness of the account and
purely a matter of law for the court and since the question of account
and satisfaction was also for the court in determining on the undisputed
facts, the court erred in submitting those questions to the jury. We
are impelled to hold that the court erroneously gave instructions
referred to at the close of all the evidence.

Such other points as have been urged have been considered,
but in the view we take of this case further discussion would only
unnecessarily prolong this already long opinion.

For the reasons stated herein the judgment of the superior
court is reversed.

JUDGMENT REVERSED.

Friend and Hardin, JJ., concur.

304 ILL. App

40817

AVERY BRUNDAGE,
Appellant,

v.

E. C. PROCTOR and HARVEY FARRINGTON.

HARVEY FARRINGTON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

36a

304 I.A. 253

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

August 6, 1929, E. C. Proctor and Harvey Farrington executed a promissory note for $500 with warrant of attorney attached, payable to the order of Avery Brundage on or before ninety days. September 7, 1929, Proctor and Farrington executed their note for $1,500 with warrant of attorney attached, also payable to the order of Avery Brundage on or before sixty days. In separate suits judgments by confession were entered on the respective notes on March 23, 1937, against Proctor and Farrington. Defendant Farrington was granted leave to appear and defend and to demand a jury in each case, and the causes were then consolidated for trial. The jury returned a verdict finding the issues in favor of defendant Farrington and judgment was entered thereon that "judgments by confession of March 23, 1937, be vacated and set aside as to defendant Harvey Farrington." This appeal by plaintiff followed.

The only issue upon the trial was whether or not defendant Harvey Farrington was an accommodation maker of the notes for the benefit of plaintiff, Avery Brundage. The evidence shows without dispute that Avery Brundage, the payee named in the notes in question, was the owner and holder thereof and that the defendant Harvey Farrington signed them.

As to the circumstances under which he signed the notes

August 6, 1929, H. O. Proctor and Harvey Farrington executed a promissory note for $500 with warrant of attorney attached, payable to the order of Avery Brundage on or before ninety days. September 7, 1929, Proctor and Farrington executed their note for $1,500 with warrant of attorney attached, also payable to the order of Avery Brundage on or before ninety days. In separate suits judgments by confession were entered on the respective notes on March 21, 1932, against Proctor and Farrington. Defendant Farrington was granted leave to appear and defend and to demand a jury in each case, and the causes were then consolidated for trial. The jury returned a verdict finding the issues in favor of defendant Farrington and judgment was entered thereon that "judgments by confession of March 21, 1932, be vacated and set aside as to defendant Harvey Farrington." This appeal by plaintiff followed.

The only issue upon the trial was whether or not defendant Harvey Farrington was an accommodation maker of the notes for the benefit of plaintiff, Avery Brundage. The evidence there disclosed that Harvey Farrington, the payee named in the notes in question, was the owner and holder thereof and that the defendant Harvey Farrington signed them.

As to the circumstances under which he signed the notes

Dr. Harvey Farrington testified on direct examination as follows: "Q. Doctor, you have admitted signing the two notes that have been introduced in evidence? A. Yes. Q. And you signed them on the date they bear, is that right? A. That is right. Q. How did you come to sign these notes? A. I came to sign them because Mr. Proctor brought them to me and asked me to do it in order to get some money and in order that Mr. Brundage might get a sufficient amount to discount at the bank. Q. Did he get anything at the time you signed the notes? A. No. The Court: Is that what Proctor told you? The witness: A. Yes. The Court: If there is an objection to it, I will sustain the objection. Mr. Kemp: I object to it on the ground it is hearsay. The Court: All right. I will sustain the objection as to what Proctor told Farrington. Mr. McNamara: Did Mr. Proctor give you anything at the time you signed the notes? The Witness: A. No. Q. Did Mr. Brundage give you anything at the time? A. No. Q. At that time, did you know Mr. Brundage? A. No. Q. How long after that was it before you first met Mr. Brundage? A. Two or three years. Q. Had you ever had any business dealings in which Mr. Brundage was interested? A. No. Q. Now, did you ever get anything after you signed the notes, either from Mr. Proctor or Mr. Brundage? A. No."

His testimony on cross-examination follows: "Q. Now, Doctor Farrington, you say you signed these notes really at the request of Mr. Proctor? A. Yes. Q. And you had no connection with Mr. Brundage at all? A. No. Q. You never saw him at the time you signed the notes and had never had any conversations with Mr. Brundage? A. No. Q. And you signed them entirely at the request of Mr. Proctor? A. Yes. Q. You say at that time you received nothing when you signed the notes? A. That is correct. Q. Would you tell the court what you were to receive in the future after signing the notes? A. I do not know of anything. There was no conversation to that effect. Q. You signed the notes at the request of Mr. Proctor. A. I had a great admiration and

Mr. Harvey Partington testified on direct examination as follows:

"Q. Doctor, you have admitted signing the notes that have been introduced in evidence? A. Yes. Q. And you signed them on the date they bear, is that right? A. That is right. Q. How did you come to sign those notes? A. I came to sign them because Mr. Proctor brought them to me and asked me to do it in order to get some money and in order that Mr. Brumbaugh might get a sufficient amount to discount at the bank. Q. Did he get anything at the time you signed the notes? A. No. The Court: Is that what Proctor told you? The witness: A. Yes. The Court: If there is an objection to it, I will sustain the objection. Mr. Kemp: I object to it on the ground it is hearsay. The Court: All right. I will sustain the objection as to what Proctor told Partington. Mr. McNamara: Did Mr. Proctor give you anything at the time you signed the notes? The witness: A. No. Q. Did Mr. Brumbaugh give you anything at the time? A. No. Q. At that time, did you know Mr. Brumbaugh? A. No. Q. How long after that was it before you first met Mr. Brumbaugh? A. Two or three years. Q. Had you ever had any business dealings in which Mr. Brumbaugh was interested? A. No. Q. Now, did you ever get anything after you signed the notes, either from Mr. Proctor or Mr. Brumbaugh? A. No."

His testimony on cross-examination follows: "Q. Now, Doctor Partington, you say you signed these notes really at the request of Mr. Proctor? A. Yes. Q. And you had no connection with Mr. Brumbaugh at all? A. No. Q. You never saw him at the time you signed the notes and had never had any conversations with Mr. Brumbaugh? A. No. Q. And you signed them entirely at the request of Mr. Proctor? A. Yes. Q. You say at that time you received nothing when you signed the notes? A. That is correct. Q. Would you tell the court what you were to receive in the future after signing the notes? A. I do not know of anything. There was no understanding to that effect. Q. You signed the notes at the request of Mr. Proctor. A. I had a great admiration and

confidence in him. The Court: In whom? Mr. Kemp: In Mr. Proctor. The Witness: Mr. Proctor. Mr. Kemp: Q. And you were doing it to help Mr. Proctor? A. I was doing it to help him. The Court: Did you know that some day you might be called upon to pay that note? The Witness: A. I suppose I am not a very good business man. Q. Didn't you know that the note provided that ninety days after date you were going to pay Avery Brundage on this particular note five hundred dollars? You knew that, didn't you? A. I knew that. Q. Well, did you think you were doing this just for the fun of it? A. No, couldn't hardly think that. Mr. McNamara: Just what occurred at that time? Did he tell you why he wanted to do it? Mr. Kemp: Well— Mr. McNamara: Let him tell why. Mr. Kemp: It is not a matter he can testify to, as to conversations with Mr. Proctor. The Court: I don't think that is admissible. Mr. McNamara: You have gone into the conversations with Mr. Proctor, as to what Mr. Proctor promised after he signed it. The Court: Q. You never talked to Mr. Brundage about this note after you signed it or before you signed it? The Witness: A. Not that I recollect. Q. Brundage didn't ask you to sign the note, did he? A. No."

Called as a witness by plaintiff under the statute, he testified as follows: "Mr. Kemp: Q. Just one more question, Doctor Farrington, to get matters straight. When you signed these notes, will you tell the Court whether you had any expectation at that time of receiving anything from the signing of the notes? The Witness: A. No, I didn't expect anything outside of my favor to him. Q. Just a favor to Mr. Proctor? A. I understood he needed it for his deal to help Mr. Brundage to obtain this money. That is what I understood about the whole thing. The Court: Did he say Mr. Brundage wanted the money or Proctor wanted the money. The Witness: A. No, I don't know further except that they wanted it for a deal. Q. Who wanted the money, was it he or Brundage wanted the money, if you know. A. I am just trying to think, now, whether he wanted the money to put into the deal they were working on. A. Proctor did? A. Yes."

confidence in him. The Court: In whom? Mr. Kemp: In Mr. Proctor. The Witness: Mr. Proctor. Mr. Kemp: Q. And you were doing it to help Mr. Proctor? A. I was doing it to help him. The Court: Did you know that some day you might be called upon to pay that note? The Witness: A. I suppose I am not a very good business man. Q. Didn't you know that the note provided that ninety days after date you were going to pay twenty thousand in U.S. gold-standard-weight five hundred dollars? You knew that, didn't you? A. I knew that. Q. Well, did you think you were doing this just for the fun of it? A. No, maybe's nearly doing that. Mr. Kemmerer: Just what occurred at that time? Did he tell you why he wanted to do it? Mr. Kemp: Well— Mr. McKamerer: Let him tell why. Mr. Kemp: It is not a matter he can testify to, as to conversations with Mr. Proctor. The Court: I don't think that is admissible. Mr. McKamerer: You have gone into the conversations with Mr. Proctor, as to what Mr. Proctor promised after he signed it. The Court: Q.— Did you never talk to Mr. Brundage about the note after you signed it or before you signed it? The Witness: A. Not that I recollect. Q. Brundage didn't ask you to sign the note, did he? A. No."

Called as a witness by plaintiff under the statute, he testified as follows: "Mr. Kemp: Q. Did you have a conversation, Senator Farrington, to get matters straight. When you signed those notes, will you tell the Court whether you had any conversation at that time of receiving anything from the signing of the notes? The Witness: A. No, I didn't request anything because of my favor to him. Q. Had a favor to Mr. Proctor? A. I understood he needed it for this deal to help us. Brundage is again talk money. That is what I understand about the whole thing. The Court: Did he say to Brundage about the money or Proctor needed the money. The Witness: A. No, I don't know Further about that they needed it for a deal. Q. You wanted the money, was it to or Brundage wanted the money, if you know. A. I do not right to think, but, whether he helped the money to pay them the deal they were working on. A. Further said A. Yes."

The fact that one is an accommodation maker will not be a defense to an action brought by anyone other than the accommodated party. In 8 C. J., 263, sec. 412, it is said: "The defense of want of consideration is available only against the party accommodated, and it is immaterial that the holder knows that the paper is accommodation paper. This rule protects the payee of a note who takes it with knowledge that, as between others, it is accommodation paper." An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor and for the purpose of lending his name to some other person. (Illinois Rev. Stat. 1937, ch. 98, sec. 49.) The accommodated party is he to whom the credit of the accommodation party is lent and the fact that one derives some incidental benefit from the paper will not make it accommodation paper as to him. (8 C. J., 254, sec. 401.) Considering the very nature of accommodation paper it is readily apparent that one cannot lend his name or credit to another person so as to make him an accommodated party without that other person's knowledge and without the intention of such other person to become an accommodated party. Therefore, in order for Farrington to establish his defense that he was an accommodation maker of the notes for the benefit of plaintiff, it was necessary for him to prove that he received no consideration for the signing of the notes; that he signed them in order to put his name and credit at the disposal of Avery Brundage; and that it was the intention of Brundage to borrow Farrington's name and credit and it was the intention of Farrington to lend his name and credit to Brundage. It was no defense for Farrington to show merely that he received no consideration for signing the notes and that he signed them solely at the request of E. C. Proctor. That was exactly what he showed and all that he did show by his testimony.

Notwithstanding the fact that Farrington testified directly and positively that he did not sign the notes to accommodate Brundage, whom he did not even know at the time, his counsel sought

The fact that one is an accommodation maker will not be a defense to an action brought by anyone other than the accommodated party. In 6 C. J., 203, sec. 412, it is said: "The defense of want of consideration is available only against the party accommodated, and it is immaterial that the holder knows that the paper is accommodation paper. This rule protects the payee of a note who takes it with knowledge that, as between others, it is accommodation paper." An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor and for the purpose of lending his name to some other person. (Uniform Nev. Stat. 1931, ch. 38, sec. 42.) The accommodated party is he to whom the credit of the accommodation party is lent and the fact that the payee knew particular credit from the paper will not make it accommodation paper as to him. (6 C. J., 204, sec. 422.) Considering the very nature of accommodation paper it is readily apparent that one cannot lend his name or credit to another person so as to make him an accommodation party without that other person's knowledge and without the intention of such other person to become an accommodated party. Therefore, in order for Farrington to establish his defense that he was an accommodation maker of the notes for the benefit of plaintiff, it was necessary for him to prove that he received no consideration for the signing of the notes; that he signed them in order to put his name and credit at the disposal of Henry Dreschsler; and that it was the intention of Dreschsler to borrow Farrington's name and credit and it was the intention of Farrington to lend his name and credit to Dreschsler. It was an defense for Farrington to show merely that he received no consideration for signing the notes and that he signed them solely at the request of H. G. Dreschsler. That was exactly what he showed and all that he did show by his testimony.

Notwithstanding the fact that Farrington testified directly and positively that he did not sign the notes in accommodation Dreschsler, when he did not even know as the time, his counsel sought

at the trial and still seeks to make it appear that somehow or other Farrington was mistaken and that after all he did sign the notes to accommodate plaintiff. Over plaintiff's objection the court admitted in evidence several letters and a certain signed agreement relating to matters in which plaintiff had been interested with Proctor or with Proctor and others. Defendant's counsel was also permitted to interrogate plaintiff regarding these transactions. These matters were wholly unrelated to the notes in question and in our opinion the evidence as to these extraneous matters, having no proper place in this case, could only have been calculated to confuse, mislead and prejudice the jury.

A rather peculiar and unique situation is presented. As heretofore stated, Farrington testified directly and positively to the actual state of facts - that he did not sign the note to accommodate Brundage. It was urged in the trial court and it is urged here that from the evidence as to the unrelated transactions, all of which occurred at least eight months prior to the execution of the notes, inferences favorable to Farrington's defense might be drawn. In other words it might be inferred from such evidence that the facts as testified to by Farrington were not true. The evidence as to these unrelated transactions was wholly inadmissible and in any event no inferences, either favorable or unfavorable to Farrington, could have been drawn from such transactions since they had absolutely no bearing on the one issue raised in this case. The only purpose served by the admission of this evidence was to afford an opportunity to the jury to guess and speculate on what might appear to them as possibilities of the situation.

Inasmuch as there is no evidence in the record to sustain the only defense offered by the defendant Farrington, the trial court should have directed a verdict or entered judgment <u>non obstante verdicto</u> in favor of plaintiff.

The judgment of the Municipal court of Chicago is reversed

at the trial and still seems to make it appear that someone or other Ferrington was mistaken and that after all he did sign the marks in accordance plaintiff. Even plaintiff's objections the court admitted in evidence several letters and a certain signed statement relating to matters in which plaintiff had been interested with Proctor or with Proctor and others. Defendant's counsel was also permitted to interrogate plaintiff regarding these transactions. These matters were wholly unrelated to the notes in question and in our opinion the evidence as to these extraneous matters, having no proper place in this case, could only have been calculated to confuse, mislead and prejudice the jury.

A rather peculiar and unique situation is presented. As hereinbefore stated, Ferrington testified directly and positively to the actual state of facts - that he did not sign the note to accommodate Brundage. It was urged in the trial court and it is urged here that from the evidence as to the unrelated transactions, all of which occurred at least eight months prior to the execution of the notes, inferences favorable to Ferrington's defense might be drawn. In other words it might be inferred from such evidence that the facts as testified to by Ferrington were not true. The evidence as to these unrelated transactions was wholly inadmissible and in any event no inference, either favorable or unfavorable to Ferrington, could have been drawn from such transactions since they had absolutely no bearing on the one issue raised in this case. The only purpose served by the admission of this evidence was to afford an opportunity to the jury to guess and speculate on what might appear to them as possibilities of the situation.

Inasmuch as there is no evidence in the record to sustain the only defense offered by the defendant Ferrington, the trial court should have directed a verdict or entered judgment non obstante veredicto in favor of plaintiff.

The judgment of the municipal court of Chicago is reversed

and judgment is entered here affirming the judgments theretofore entered by confession by the said Municipal court of Chicago in the separate actions on March 23, 1937, in the respective amounts of $834.22 and $2,488.98.

JUDGMENT OF THE MUNICIPAL COURT REVERSED. JUDGMENT HERE AFFIRMING JUDGMENTS BY CONFESSION ENTERED BY THE MUNICIPAL COURT OF CHICAGO IN THE SEPARATE ACTIONS ON MARCH 23, 1937, IN THE RESPECTIVE AMOUNTS OF $834.22 and $2,488.98.

Friend and Scanlan, JJ., concur.

304 Ill. App

40838

JEFFERY BULK SERVICE STATION, Inc.,
Appellee,

v.

GEORGE P. GOETZINGER et al.,
On Appeal of JOHN GOETZINGER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 254

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant John Goetzinger seeks to reverse a judgment for $921.50 entered against him in an action brought on a note by plaintiff, Jeffery Bulk Service Station. On July 21, 1936, judgment was confessed on the note for $1,046.26 in favor of plaintiff and against John Goetzinger, his wife, Mary Goetzinger, and their son, George P. Goetzinger, whose purported signatures appeared on the note as the makers thereof. On January 10, 1939, defendants John Goetzinger (sometimes hereinafter for convenience referred to as defendant Goetzinger) and Mary Goetzinger, presented a motion to vacate the judgment by confession and filed affidavits in support thereof, in which they asserted respectively that the signatures on the note and warrant of attorney purporting to be theirs were not in fact their signatures, that they did not sign the note or warrant of attorney, that they did not authorize any person to sign the note or warrant of attorney for them, that they had not ratified the signatures on the note purporting to be theirs, and that the signatures on the note were forgeries. Plaintiff filed an amended answer to the motion to vacate, alleging facts which it claimed showed a ratification by defendants of their forged signatures or in the alternative that the note was actually signed by them or that they had authorized some one else to sign it for them. There is no evidence in the record that defendants signed the note themselves or that they authorized anyone else to sign it for them. March 20, 1939,

By this appeal defendant John Goetzinger seeks to reverse a judgment for $9221.70 entered against him in an action brought on a note by plaintiff, Jeffery Bank Service Station. On July 21, 1936, judgment was confessed on the note for $1,046.26 in favor of plaintiff and against John Goetzinger, his wife, Mary Goetzinger, and their son, George T. Goetzinger, whose purported signatures appeared on the note as the makers thereof. On January 10, 1939, defendants John Goetzinger (sometimes hereinafter for convenience referred to as defendant Goetzinger) and Mary Goetzinger, presented a motion to vacate the judgment by confession and filed affidavits in support thereof, in which they asserted respectively that the signatures on the note and warrant of attorney purporting to be theirs were not in fact their signatures, that they did not sign the note or warrant of attorney, that they did not authorize any person to sign the note or warrant of attorney for them, that they had not ratified the signatures on the note purporting to be theirs, and that the signatures on the note were forgeries. Plaintiff filed an amended answer to the motion to vacate, alleging facts which it claimed showed a ratification by defendants of their forged signatures or in the alternative that the note was actually signed by them or that they had authorized some one else to sign it for them. There is no evidence in the record that defendants signed the note themselves or that they authorized anyone else to sign it for them. March 20, 1939,

the judgment by confession was vacated as to all defendants and by agreement of the parties (except George Goetzinger, who was not present or represented) the cause was tried on the merits by the court without a jury. The issues were found against defendant John Goetzinger and judgment for $921.50 entered against him only.

The evidence shows without contradiction that the signatures of John Goetzinger and Mary Goetzinger are not genuine and the only question presented is whether the judgment of the court based on its finding that defendant John Goetzinger ratified the unauthorized signing of his name to the note is against the manifest weight of the evidence.

The only witness who appeared in plaintiff's behalf was its attorney of record, Samuel Wexler. Sometime prior to June 6, 1936, the note in question was turned over to him for collection. On June 6, 1936, and July 17, 1936, as attorney for plaintiff, he wrote letters to defendants John and Mary Goetzinger, urging them "to make arrangements" to pay the note in question. Following the entry of the judgment by confession several other letters were written by Wexler to John Goetzinger and his wife warning them of various consequences that would follow their failure to pay said judgment, one of the letters expressing the desire "to discuss with you, the matter of George Goetzinger, your son." He received no reply to any of these letters but defendant John Goetzinger went to Wexler's office on July 19, 1936, after the second of the above mentioned letters had been received by him. Wexler testified that on that occasion, "I showed Mr. Goetzinger the note and I asked him if this was his note and he said yes that was the note, and he told me that he was endeavoring to make a loan with a real estate office on the south side about the mortgage on his property at that time. I think the name of the company is Ringer, and I asked him how about making the payment and he said he would make the payment within the next ten to thirty days *** He said that was his note." As to his conversation with Wexler on this occasion defendant Goetzinger testified: "The first time when I got

the judgment by confession was vacated as to all defendants and by agreement of the parties (except George Goetzinger, who was not present or represented) the cause was tried on the merits by the court without a jury. The issues were found against defendant John Goetzinger and judgment for $921.50 entered against him only.

The evidence shows without contradiction that the signatures of John Goetzinger and Mary Goetzinger are not genuine and the only question presented is whether the judgment of the court based on its finding that defendant John Goetzinger ratified the unauthorized signing of his name to the note is against the manifest weight of the evidence.

The only witness who appeared in plaintiff's behalf was its attorney of record, Samuel Wexler. Sometime prior to June 6, 1936, the note in question was turned over to him for collection. On June 6, 1936, and July 17, 1936, as attorney for plaintiff, he wrote letters to defendants John and Mary Goetzinger, urging them "to make arrangements" to pay the note in question. Following the entry of the judgment by confession several other letters were written by Wexler to John Goetzinger and his wife warning them of various consequences that would follow their failure to pay said judgment, one of the letters expressing the desire "to discuss with you, the matter of George Goetzinger, your son." He received no reply to any of these letters but defendant John Goetzinger went to Wexler's office on July 19, 1936, after the second of the above mentioned letters had been received by him. Wexler testified that on that occasion, "I showed Mr. Goetzinger the note and I asked him if this was his note and he said yes that was the note, and he told me that he was endeavoring to make a loan with a real estate office on the south side about the mortgage on his property at that time. I think the name of the company is Ringer, and I asked him how about making the payment and he said he would make the payment within the next ten to thirty days *** He said that was his note." In his conversations with Wexler on this occasion defendant Goetzinger testified: "The first time when I got

one of them letters and I went up there to see him. I don't know whether it was the first or second letter." When asked if it was sometime in the Summer of 1936, he answered, "Around there, yes." He further testified: "He [Wexler] showed me the note. I told him, I said 'What do you want me to pay nine hundred and some dollars for; what is it for?' He said 'Well, you signed a note for a filling station,' *** I told him I didn't sign that note and neither did my wife *** I told him I wouldn't pay the note and I didn't sign it, and he told me about what he could do with George and I said, 'Well, that is up to you. I couldn't pay that note. I won't pay it. I didn't sign it.'*** That was all about the note." When asked, "Did you at that time or at any other time state 'That is my note and I will pay it,'" he answered "I did not." When asked "Did you tell him you were going to raise the money by a loan or a mortgage on your house," he answered "I did not." As heretofore shown, Wexler confessed judgment on the note two days later, on July 21, 1936.

John Goetzinger again called at Wexler's office on August 6, 1936, after being served with an execution. Wexler testified that on the occasion of this visit, "He told me he was still endeavoring to make a loan with this real estate office on the south side in order to take care of this judgment *** and I told him, well I told him that I had the judgment and was going to keep that as security until I got payment on my particular judgment, and I also told him that I wanted him to see that this thing is taken care of right away." As to this conversation Goetzinger testified: "I told him I didn't see how they could hold me responsible for anything I didn't do. *** He said, 'You know all about what a bad actor George was' *** and what they could to to him and so forth, and I said 'I can't help it. You can do whatever you want to.'"

Defendant Mary Goetzinger testified that her son, George, came home one day and asked her and her husband to sign a note, which he did not show her; that her husband said that he would not sign it and told her not to sign it either; and that she did not sign it.

one of them letters and I went up there to see him. I don't know whether it was the first or second letter." Then asked if it was sometime in the summer of 1936, he answered, "around there, yes." He further testified: "He [worker] showed me the note. I told him, I said 'What do you want me to pay nine hundred and some dollars for; what is it for?' He said 'Well, you signed a note for a filling station.' *** I told him I didn't sign that note and neither did my wife *** I told him I wouldn't pay the note and I didn't sign it, and he told me about what he could do with George and I said, 'Well, that is up to you. I couldn't pay that note. I won't pay it. I didn't sign it.'*** That was all about the note." When asked, "Did you at that time or at any other time state 'That is my note and I will pay it,'" he answered "I did not." When asked "Did you tell him you were going to raise the money by a loan or a mortgage on your house," he answered "I did not." As heretofore shown, Wexler confessed judgment on the note two days later, on July 21, 1936.

John Goetzinger again called at Wexler's office on August 6, 1936, after being served with an execution. Wexler testified that on the occasion of this visit, "He told me he was still endeavoring to make a loan with this real estate office on the south side in order to take care of this judgment *** and I told him, well I told him that I had the judgment and was going to keep that as security until I got payment on my particular judgment, and I also told him that I wanted him to see that this thing is taken care of right away." As the time approached Goetzinger testified: "I said, 'I don't see how they could hold me responsible for anything I didn't do.' *** He said, 'You know all about what a bad actor George was' *** and what they could to to him and so forth, and I said 'I can't help it. You can do whatever you want to.'"

Defendant Mary Goetzinger testified that her husband, George, came home one day and asked her and her husband to sign a note, which he did not show them; that her husband said that he would not sign it and told her not to sign it either; and that she did not sign it.

Both Mary Goetzinger and Wexler testified that he telephoned her a couple of times about the note. While Wexler testified that she did not deny the genuineness of the signatures of herself and her husband, she testified that she told him over the telephone "My husband and I did not sign any note." John Goetzinger further testified that he received through the mail a letter dated December 14, 1938, from a concern known as "Information Service," advising him that some real estate was being sold upon a judgment rendered against him in this case. According to Wexler, John Goetzinger telephoned him in December, 1938, and told him for the first time that the note did not bear "the signatures of his wife and himself and that the reason he did not tell me at the time he gave me - when I showed him the note, was the fact that George Goetzinger went bad and that he didn't want to have his son prosecuted criminally for forgery on the note." Wexler testified that he could not identify John Goetzinger's voice over the telephone. John Goetzinger denied that he telephoned to Wexler then or at any other time. Both John Goetzinger and his wife testified that their son, George, has been in Chicago continuously since he worked for plaintiff in 1934 and 1935 and that he is still in the city.

It is, of course, the law that where one understandingly adopts and ratifies the unauthorized use of his name as the maker of a note, he is liable thereon.

As opposed to Wexler's testimony that John Goetzinger, when shown the note "said it was his note" and when asked about paying same "said he would make the payment within the next ten to thirty days," there is the positive testimony of both John Goetzinger and Mary Goetzinger that they told Wexler that they did not sign the note and would not pay it and the emphatic denial of John Goetzinger that he told Wexler that it was his note and that he would pay it. This being the extent of the evidence bearing upon the subject of ratification, the probabilities become very material. Is it not highly improbable that, after he had written two letters to John and Mary Goetzinger requesting them to make arrangements to pay the note and

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after John Goetzinger in response to said letters had visited Wexler's office, and, according to him, admitted that the note was his and arranged to pay it, Wexler would immediately confess judgment on the note? Wexler's letters of June 6, 1936, and July 17, 1936, certainly indicated that if John and Mary Goetzinger made arrangements to pay the note he would be relieved of the necessity of instituting legal proceedings against them. If, as Wexler testified, John Goetzinger not only acknowledged that the note was his but agreed to mortgage his home to pay it within "ten to thirty days," that arrangement should have been entirely satisfactory to Wexler. If this arrangement was in fact made it is difficult for us to understand what impelled Wexler two days thereafter to institute this lawsuit which action, according to the tenor of his first two letters, he seemed so reluctant to take.

The authorities hold that a ratification to be binding must be made with full knowledge of the facts. It does not appear that when John Goetzinger was in Wexler's office he knew who signed his or the other names on the note. In fact the evidence fails to disclose the identity of the forger. While there is evidence in the record that at one time the son, George P. Goetzinger, requested his parents to sign a note and they refused to do so, there is no showing that when John Goetzinger is supposed to have told Wexler that the note was his and that he would pay it, that he had any knowledge of the circumstances under which the note was executed and delivered. As has already been shown, both John and Mary Goetzinger testified that in practically all of the conversations they had with Wexler, he threatened to prosecute their son criminally and send him to jail if they did not pay the note. Wexler denied that he ever threatened "to prosecute the son." He said that forgery was not mentioned in any of the conversations between himself and John and Mary Goetzinger until John Goetzinger telephoned him in December, 1938, and told him that "the signatures of his wife and himself" were forgeries and that the reason he had not told him that in the first instance was "the fact that

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George Goetzinger went bad and that he didn't want to have him prosecuted criminally for forgery on the note." Since John Goetzinger denied having this telephone conversation and Wexler testified that he could not identify the voice that spoke to him over the telephone as that of John Goetzinger, Wexler's testimony as to this telephone conversation should be entirely disregarded. Wexler's testimony to the effect that he never discussed with the parents the possible plight of their son is refuted to some extent, at least, by the statement in his letter to them of September 30, 1936, that "we wish to discuss with you the matter of George Goetzinger, your son." It is readily apparent that none of the evidence as to the son is of any assistance to plaintiff on the issue of ratification, since, according to Wexler, nothing was said about the purported forgery by the son of his parents' signatures until December, 1938, which was about two and a half years after Wexler claimed that John Goetzinger had ratified the unauthorized use of his name as one of the makers of the note.

Wexler remained the attorney of record for plaintiff until this proceeding terminated in the trial court. Another attorney did, however, conduct the trial for plaintiff without being substituted as his attorney of record, but there is no question but that Wexler managed the suit throughout. The Supreme court of this state has repeatedly said that, "When an attorney assumes the double burden of representing his client and furnishing evidence to insure success in a litigation, little weight is to be given to his testimony." Wiederhold v. Wiederhold, 305 Ill. 429. This is not a case where the attorney may be absolved from criticism because some unforeseen event occurred during the progress of the trial that required him to testify. He knew for several months before the trial that defendants John and Mary Goetzinger charged in their affidavits filed in support of their motion to vacate the judgment by confession, that the signatures on the note purporting to be theirs were forged.

We are not unmindful of the rule that, where an attorney

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Wexler remained the attorney of record for plaintiff until this proceeding terminated in the trial court. Another attorney did, however, conduct the trial for plaintiff without being substituted as his attorney of record, but there is no question but that Wexler managed the suit throughout. The Supreme court of this state has repeatedly said that, "When an attorney assumes the double burden of representing his client and furnishing evidence to learn material in a litigation, little weight is to be given to his testimony." Blackburn v. Wisdorfield, 307 Ill. 429. This is not a case where the attorney may be shielded from criticism because some unforeseen event occurred during the progress of the trial that required him to testify. He knew for several months before the trial that defendants John and Mary Oestringer charged in their affidavits filed in support of their motion to vacate the judgment by confession, that the signatures on the note purporting to be theirs were forged.

[illegible] are not unmindful of the rule that, where an attorney

testifies in a case in which he is employed as such, the fact of his being so employed goes only to the weight of his testimony and not to its competency, and neither are we unmindful of the rule that where the trial court in a trial without a jury has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the weight of the evidence, but where, as here, the burden of proof as to ratification was upon plaintiff, where its attorney, Dexler, was its only witness, where his testimony was uncorroborated, not in consonance with the probabilities of the situation and was contradicted by both John and Mary Goetzinger, and where there was no showing that John and Mary Goetzinger had any knowledge as to who signed their names on the note or even of the circumstances under which it was signed and given, the evidence considered in the view most favorable to plaintiff shows a doubtful state of facts. In Chicago Edison Co. v. Fay, 164 Ill. 323, the court said at p. 392: "While this court has held that a forged note may be ratified by the principal so as to bind him (Livings v. Wiler, 32 Ill. 387; Hefner v. Vandolah, 62 id. 483, and Hefner v. Dawson, 63 id. 403), it has not, to our knowledge, been held in any case that a ratification of a forged instrument can be implied from a doubtful state of facts." In Gleason, Admx. v. Henry et al., 71 Ill. 109, the court said at p. 110, quoting from Parson's: "'It is' says Parsons, 'an almost universal rule that the ratification must be made with full knowledge on the part of the principal of the facts affecting his rights.' 1 Pars. on Notes and Bills, 101; Helm v. Cantrell et al., 59 Ill. 529."

In our opinion the judgment is not only clearly against the weight of the evidence, but in the light of the foregoing authorities we do not think that the evidence in this case with all the reasonable inferences that may be drawn from it makes defendant John Goetzinger

testifies in a case in which he is employed as such, the fact of his being so employed goes only to the weight of his testimony and not to its competency, and neither are we unmindful of the rule that where the trial court in a trial without a jury has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the weight of the evidence, but there, as here, the burden of proof as to rectification was upon plaintiff, where his attorney, Baker, was the only witness, where his testimony was uncorroborated, not in consonance with the probabilities of the situation and was contradicted by both John and Mary Goetzinger, and where there was no showing that John and Mary Goetzinger had any knowledge as to the signed draft nor on the note or even of the circumstances under which it was signed and given, the evidence considered in the view most favorable to plaintiff shows a doubtful state of facts. In Gilmore McKeen Co. v. Fox, 164 Ill. 325, the court said at p. 329: 'While this court has held that a fact in issue may be settled by the preponderance of the evidence, Pierce v. Milam, 39 Ill. 387; Eckert v. Tandrup, 64 Ill. 411, and Talbot v. Bowen, 61 Ill. 43), it has not, to our knowledge, been held in any case that a rectification of a legal instrument can be implied from a doubtful state of facts.' In Gilmore, Adams v. Hunter et al., 71 Ill. 199, the court said at p. 202, quoting from Pomeroy: 'It is a maxim, in almost universal rule, that the rectification must be made with full knowledge on the part of the principal of the facts affecting his rights.' 1 Pom. on Notes and Bills, 383; Mills v. Hawkins et al., 77 Ill. 329)."

In our opinion the judgment is not only clearly against the weight of the evidence, but in the light of the foregoing authorities we do not think that the evidence in this case with all the reasonable inferences that may be drawn from it makes differences from ordinary

liable upon the note sued on.

The judgment of the Municipal court of Chicago will therefore be reversed and judgment entered here in favor of defendant John Goetzinger and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR OF DEFENDANT JOHN GOETZINGER AND AGAINST PLAINTIFF.

Friend and Scanlan, JJ., concur.

304 ILL. APP.

40891

PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON, Auditor of Public Accounts,
Complainant below,

v.

UNION BANK OF CHICAGO, a corporation,
Defendant below.

38

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MAE L. RIORDAN, Intervening Petitioner below,
Appellant,

v.

HARRY R. SPELLBRINK, as successor Receiver, etc., Respondent below,
Appellee.

304 I.A. 254

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In this proceeding for the liquidation of the Union Bank of Chicago (hereinafter for convenience referred to as the bank), Mae L. Riordan filed an intervening petition for the allowance of two claims, one for $4,500 and the other for $500. A decree was entered which allowed her claim for $500 and denied her claim for $4,500. She appeals from that portion of the decree which denied her claim of $4,500.

Her amended intervening petition alleged that the Union Bank of Chicago, a corporation, was closed by the state auditor June 4, 1932; that it was a banking corporation; that August 20, 1926, "she entered into a real estate contract with said Union Bank of Chicago for the purchase of some real estate, which contract was signed by Mae L. Riordan and the Union Bank of Chicago, as agent;" that pursuant to the execution of said contract, she paid to the Union Bank of Chicago $4,500 August 31, 1926, as part of the purchase price of the real estate described in said contract; that "no forfeiture of said contract ever having been made she was entitled to have allowed and paid to her by the receiver of the Union Bank of

40891

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR NELSON, Auditor of
Public Accounts,
Complainant below,

v.

UNION BANK OF CHICAGO, a cor-
poration,
Defendant below.

MAE L. HIGDEM, Intervening
Petitioner below,

Appellant,

v.

HARRY R. SPRINGHORN, as successor
Receiver, etc., Respondent below,
Appellee.

38

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

30-1 Ill. 254

MR. PRESIDENT DUNCAN DELIVERED THE OPINION OF THE COURT:

In this proceeding for the liquidation of the Union Bank of Chicago (hereinafter for convenience referred to as the bank), Mae L. Higdem filed an intervening petition for the allowance of two claims, one for $4,300 and the other for $500. A decree was entered which allowed her claim for $500 and denied her claim for $4,300. The appeals from that portion of the decree which denied her claim of $4,300.

Her amended intervening petition alleged that the Union Bank of Chicago, a corporation, was closed by the state auditor June 4, 1932; that it was a banking corporation; that August 30, 1924, "she entered into a real estate contract with said Union Bank of Chicago for the purchase of some real estate, which contract was signed by Mae L. Higdem and the Union Bank of Chicago, as agent;" that pursuant to the execution of said contract, she paid to the Union Bank of Chicago $4,300 August 31, 1924, as part of the purchase price of the real estate described in said contract; that "no fee-fixture of said contract ever having been made she was entitled to have allowed and paid to her by the receiver of the Union Bank of

Chicago $4,500;" and that Harry R. Spellbrink (hereinafter for convenience sometimes referred to as respondent) was duly appointed receiver and that he qualified as such and is now acting as receiver for said bank.

The answer of Harry R. Spellbrink, receiver of the Union Bank of Chicago, to the intervening petitioner admits the execution of the real estate contract as set forth in said petition but avers that the amount of money paid to the Union Bank of Chicago under the real estate contract by Mae L. Riordan was only $4,100, and that the Union Bank of Chicago, in accordance with the terms and conditions of the said real estate contract, elected to and did declare a forfeiture of said contract and therefore denies the claim of the petitioner to the said sum of $4,500.

The only point petitioner makes in her brief is as follows: "The right to declare a forfeiture reserved in a contract is one that may be exercised or waived by a vendor, and a failure to claim it may be regarded a waiver of the right. Until it is declared the contract continues mutually binding on the parties." She contends "that the Union Bank of Chicago or its Receiver did not at any time declare a forfeiture of the real estate contract herein involved which was executed by the plaintiff, Mae L. Riordan, and the bank, August 20, 1926, and under which contract plaintiff paid the bank the sum of $4,500."

The theory of respondent's defense to the claim of the intervening petitioner is set forth in his brief, as follows: "That the Petitioner defaulted as to all the subsequent payments required by the contract of August 20, 1926; that Petitioner abandoned and terminated said contract; that said contract was thereby forfeited; that the time of payment was made the essence of the contract; that the Union Bank of Chicago did or said nothing to the Petitioner, nor was there any conduct on its part, to infer that said Bank was not insisting upon the strict performance of the contract in accordance with its terms and provisions; that the Petitioner never

Chicago $4,500;" and that Harry K. Spellbrink, Receiver for Insurance sometimes referred to as respondent) was duly appointed receiver and that he qualified as such and is now acting as receiver for said bank.

The answer of Harry K. Spellbrink, receiver of the Union Bank of Chicago, to the intervening petitioner admits the execution of the real estate contract as set forth in said petition but avers that the amount of money paid to the Union Bank of Chicago under the real estate contract by Max I. Nierdam was only $4,150, and that the Union Bank of Chicago, in accordance with the terms and conditions of the said real estate contract, elected to and did declare a forfeiture of said contract and therefore denies the claim of the petitioner to the said sum of $4,500.

The only point petitioner makes in her brief is as follows: "The right to declare a forfeiture reserved to a creditor is one that may be exercised or waived by a vendee, and a failure to claim it may be regarded a waiver of the right. Until it is declared the contract continues mutually binding on the parties." She contends "that the Union Bank of Chicago or its receiver did not at any time declare a forfeiture of the real estate contract upon which the claim was asserted by the plaintiff, Max I. Nierdam, and the bank, August 30, 1930, and under which contract plaintiff paid the bank the sum of $4,500."

The theory of respondent's defense to the claim of the intervening petitioner is set forth in his brief, as follows: "That the petitioner defaulted as to all the subsequent payments required by the contract of March 20, 1926; that petitioner abandoned and terminated said contract; that said contract was thereby forfeited; that the time of payment was made the essence of the contract; that the Union Bank of Chicago did or said nothing to the petitioner, nor was there any consent on its part, to later that said Bank was not insisting upon the strict performance of the contract in accordance with its terms and provisions; that the petitioner never

tendered possession or the balance of the purchase money required to be paid under the terms of the contract of August 20, 1926, to said Union Bank of Chicago as Selling Agent; that the Union Bank of Chicago had a right to declare a forfeiture of the contract; that the amount paid by the Petitioner thereunder was retained by Union Bank of Chicago under the terms of the contract and that the Petitioner has no valid claim for $4,100 or any other sum against said Union Bank of Chicago."

The pertinent findings and conclusions of fact in the decree are as follows:

"The Court further finds that heretofore on the 20th day of August, 1926, Mae L. Riordan, as purchaser, entered into an agreement with the Union Bank of Chicago, as selling agent, for the purchase of Lots 1 to 44 inclusive in Block 8 in Croissant Park Markham Twelfth Addition; that the consideration for said contract of purchase was the sum of $21,000 to be paid by said Intervening Petitioner in the manner following: $4,100 in cash, receipt of which was therein acknowledged, and the balance of $16,900 payable in monthly installments of $300 or more on the 20th day of each month thereafter commencing on the 20th day of September, 1926, until August 20th, 1929, at which time the entire balance outstanding would have been paid; that said contract among other things provided that if the purchaser, Mae L. Riordan, should make all the payments and perform all the covenants of her contract said Union Bank of Chicago, as selling agent, would 'convey or cause to be conveyed to her in fee simple clear of all encumbrances whatever the real estate described in said contract'; that said contract further provided that in default of any of the payments under the provisions of said contract which continued for a period of sixty days, then at the option of said Union Bank of Chicago, as agent, said contract could be forfeited and terminated and all payments made by said purchaser would in that event be retained by said Union Bank of Chicago, as agent, in satisfaction and in liquidation of the damages sustained and that said Union Bank of Chicago, as agent, would have the right to re-enter and take possession of all the premises; that said contract further provided that said Mae L. Riordan had read and understood the whole of said contract and that no representation, promise or agreement not expressed in the contract had been made to induce said petitioner to enter into it.

"That subsequently, said Mae L. Riordan, being desirous of reselling said property, on August 30, 1926, by an instrument in writing appointed the Union Bank of Chicago as her agent in making collections and signing of contracts for the resale of said premises, and in said instrument in writing further designated, appointed and empowered one Agnes Doll to act as her sales agent in connection with the resale of the lots theretofore purchased by said Intervening Petitioner.

"That under the authority so vested in her the said Agnes Doll entered into certain negotiations for and on behalf of said petitioner for the sale of said real estate to one Frank Adducci; that the consideration for the purchase of said real estate from said Intervening Petitioner by said Frank Adducci was in the sum of

tendered possession or the balance of the purchase money required to be paid under the terms of the contract of August 26, 1920, to said Union Bank of Chicago as selling agent; that the Union Bank of Chicago had a right to declare a forfeiture of the contract; that the amount paid by the petitioner hereunder was retained by Union Bank of Chicago under the terms of the contract and that the petitioner has no valid claim for $4,100 or any other sum against said Union Bank of Chicago."

The pertinent findings and conclusions of fact in the decree are as follows:

"The court further finds that subsequent to the 20th day of August, 1920, Ike L. Hirsdan, as purchaser, entered into an agreement with the Union Bank of Chicago, as selling agent, for the purchase of lots 1 to 44 inclusive in Block 6 in Grossmann Park Addition; that the consideration for said contract of purchase was the sum of $12,000 to be paid by said Intervening Petitioner in the manner following: $4,100 in cash, receipt of which was thereon acknowledged, and the balance of $12,000 payable in monthly installments of $300 or more on the 20th day of each month thereafter commencing on the 20th day of September, 1920, until August 20th, 1922, at which time the entire balance outstanding would have been paid; that said contract among other things provided that if the purchaser, Ike L. Hirsdan, should make all the payments and perform all the covenants of her contract with Union Bank of Chicago, as selling agent, said conveyed or cause to be conveyed to her in fee simple clear of all encumbrances subject to the restrictions described in said contract; that said contract further provided that in default of any of the payments under the provisions of said contract which continued for a period of sixty days, then at the option of said Union Bank of Chicago, as agent, said contract could be forfeited and terminated and all payments made by said purchaser would in that event be retained by said Union Bank of Chicago, as agent, in satisfaction and in liquidation of the damages sustained and that said Union Bank of Chicago, as agent, could have the right to re-enter and take possession of all the premises; that said contract further provided that said Ike L. Hirsdan had read and understood the whole of said contract and that no representation, promise or agreement not expressed in the contract had been made to induce said petitioner to enter into it.

"That subsequently, said Ike L. Hirsdan, being desirous of reselling said property, on August 26, 1920, by an instrument in writing appointed the Union Bank of Chicago as her agent in making collections and signing of contracts for the resale of said premises, and in said instrument in writing further designated, appointed and empowered one Lyman Doll to act as her sales agent in connection with the resale of the lots therein; purchased by said Intervening Petitioner.

"That under the authority so vested in her the said Lyman Doll entered into certain negotiations for and on behalf of said petitioner for the sale of said real estate to one Frank Kilmartin; that the consideration for the purchase of said real estate from Intervening Petitioner by said Frank Kilmartin was in the sum of

$53,000 under which contract of purchase between said parties said Frank Adducci paid and deposited with Union Bank of Chicago, as agent for said Mae L. Riordan, the sum of $500 on account thereof, that said sum of $500 was accepted by said Union Bank of Chicago, as agent for said Intervening Petitioner under the authority so vested in it, and deposited the same to the credit of said Mae L. Riordan under Agency Account No. 1429; that subsequent thereto said Frank Adducci, the purchaser from said Mae L. Riordan, Intervening Petitioner herein, abandoned his contract and paid no further sums thereunder.

"***

"That by virtue of the default in payment of the sums as provided for in said contract and the abandonment of said contract by said Intervening Petitioner, Mae L. Riordan, said Union Bank of Chicago, as agent had a right to elect and did elect to retain the payments made by said petitioner as its fixed and liquidated damages, and that said Intervening Petitioner at no time tendered the balance due from her under the terms of said contract nor at any time demanded a deed for conveyance of said premises.

"That said Intervening Petitioner, Mae L. Riordan, except for the payment of the sum of $4,100 on her contract of purchase with said Union Bank of Chicago, as agent, paid no other sums of money under her contract and abandoned said contract and defaulted in the covenants and conditions imposed upon her by said contract.

"That the sum of $4,100 so paid by said Intervening Petitioner, Mae L. Riordan, under her contract of purchase dated the 20th day of August, 1926, between the petitioner and the Union Bank of Chicago, as agent, was deposited in a certain Trust Account known as Trust No. 861; that upon the default and abandonment of said contract by said Intervening Petitioner said Union Bank of Chicago elected to and did declare a forfeiture of said contract and served a copy of said forfeiture notice upon said petitioner in accordance with the provisions of the contract so made and provided; that said sum of $4,100 was retained as liquidated damages by virtue of the default and abandonment of said contract by said Intervening Petitioner, Mae L. Riordan.

"The Court further finds that said contract of August 20, 1926, between said Intervening Petitioner, Mae L. Riordan, as purchaser, and Union Bank of Chicago, as selling agent, was the entire contract between said parties and that in accordance with the provisions of said contract said Intervening Petitioner stipulated and agreed that she expressly understood the whole of said contract and that no representation, promise or agreement not expressed in the contract had been made to induce her to enter into said contract and that said Intervening Petitioner was bound by the provisions thereof.

"***

"The Court further finds that said Intervening Petitioner, Mae L. Riordan, defaulted in the payment of her contract and failed to perform the covenants of her said contract dated August 20, 1926, with the Union Bank of Chicago, as agent, and by virtue thereof said said sum of $4,100 so paid by said Intervening Petitioner as a down payment on her said contract was forfeited and said contract terminated and abandoned, and that said Intervening Petitioner, Mae L. Riordan, is entitled to no claim against said Union Bank of Chicago by virtue thereof."

These findings portray substantially and correctly the salient facts as adduced before the master except the finding that "said Union

Bank of Chicago elected to and did declare a forfeiture of said contract and served a copy of said forfeiture notice upon said petitioner, in accordance with the provision of the contract so made and provided." There is no evidence in the record that the bank declared a forfeiture of the contract or that it mailed petitioner a written declaration of forfeiture as provided in the contract. It is because of the failure of the bank to so declare a forfeiture and to notify her in writing of such declaration that petitioner claims under the authority of Heald v. Wright et al., 75 Ill. 17, that the contract continued to be mutually binding upon the parties and that therefore she is entitled to the return of the money paid by her thereunder. In Heald v. Wright et al., supra, the court said at p. 23: "The proofs do not show that Wright, at any time, elected to declare a forfeiture, consequently the agreement was in full life at the time of his death and continued to be mutually binding on the parties. It can have no weight, that this contract was liable to forfeiture, since Wright did not manifest his election to forfeit. It may be said, failing to claim the forfeiture was a waiver of it. Skinner v. Newberry, 51 Ill. 205."

The respondent concedes that there was no evidence of a formal declaration of forfeiture by the bank or of a notice to petitioner of a written declaration of forfeiture as provided in the contract, but he insists that since petitioner had both expressly and by her conduct abandoned the contract it was unnecessary to send her a written declaration of foreclosure and that her own act of abandonment having worked a forfeiture it would be idle, useless and needless to thereafter send her notice of such forfeiture.

The only defense presented by the answer of the receiver was that petitioner having defaulted in her payments under the contract, the "Union Bank of Chicago elected to and did declare a forfeiture of said contract and that notice of said declaration of forfeiture was mailed to said intervening petitioner by registered mail." As already shown, there is no evidence in the record to sustain this defense. That there is a variance between the defense alleged in the answer and the

Bank of Chicago elected to and did declare a forfeiture of said contract and served a copy of said forfeiture notice upon said petitioner, in accordance with the provision of the contract so made and provided." There is no evidence in the record that the bank declared a forfeiture of the contract or that it mailed petitioner a written declaration of forfeiture as provided in the contract. It is because of the failure of the bank to so declare a forfeiture and to notify her in writing of such declaration that petitioner claims under the authority of Meald v. Wright et al., 75 Ill. 47, that the contract continued to be mutually binding upon the parties and that therefore she is entitled to the return of the money paid by her thereunder. In Meald v. Wright et al., supra, the court said at p. 49: "The proofs do not show that which, in my view, elected to declare a forfeiture, consequently the agreement was in full life at the time of his death and continued to be mutually binding on the parties. It can have no weight, that this contract was liable to forfeiture, since which did not manifest his election to forfeit. It may be said, failing to claim the forfeiture was a waiver of it. Gilmer v. Cummins, 31 Ill. 529."

The respondent contends that there was no evidence of a formal declaration of forfeiture by the bank or of a notice to petitioner of a written declaration of forfeiture as provided in the contract, but he insists that since petitioner had both expressly and by her conduct abandoned the contract it was unnecessary in such an action for rescission of forfeiture and that her act of abandonment having worked a forfeiture it would be idle, useless and meaningless to thereafter send her notice of such forfeiture.

The only defense presented by the answer of the respondent was that petitioner during defaulted in her payments under the contract, the "Union Bank of Chicago elected to and did declare a forfeiture of said contract and that notice of said declaration of forfeiture was mailed to said delinquent petitioner by registered mail." As already shown, there is no evidence in the record to sustain this defense. That there is a variance between the defense alleged in the answer and the

proofs and findings of the decree relied upon by respondent is obvious. The petitioner, however, has not seen fit to question respondent's right to rely on the defense urged here to sustain the decree.

There can be no question that petitioner abandoned the contract. She testified that shortly after the execution of the contract she informed the assistant trust officer of the bank that she had at no time intended to make any of the $300 monthly payments required to be made under the terms of the contract; and that she did not make any payments other than the initial down payment. It also appeared that in 1931 or prior thereto, she instituted an action in the Circuit court for the recovery of the money paid by her on the contract. The fact that a party to a contract abandoned same may be deduced from a course of conduct or circumstances evincing an intention to abandon. Abandonment is shown where, as here, the purchaser absolutely and positively refused to perform the conditions of the contract and expressed an intention to abandon it. The intention of the petitioner was demonstrated by her statements to the officials of the bank that she would not perform her contract and that she did not intend at any time to pay the monthly installments required thereunder. The additional fact that subsequent to the execution of the contract petitioner instituted litigation to recover her initial down payment is further evidence of her intent to abandon the contract.

A somewhat similar question was before the court in Miller v. Akin, 350 Ill. 186. In that case Miller, the contract seller, brought an action to declare the contract of purchase null and void and to remove same as a cloud on the title. The contract purchaser therein, Aiken, contended as does the petitioner here, that there had not been a declaration of forfeiture of the contract and that therefore the purchaser's rights under the contract were not terminated. The court said at pp. 195, 196:

"Whether or not Miller had at the time the original bill was filed waived his right to forfeiture under the contract without making a demand for payment and serving notice of intention to declare a forfeiture, we do not deem it necessary to determine. It is certain that by the original bill Akin was notified of the intention of Miller to declare a forfeiture of the contract but Akin

rule and findings of the decree relied upon by respondent is obvious. The petitioner, however, has not seen fit to question respondent's right to rely on the defense urged here to sustain the decree.

There can be no question that petitioner abandoned the contract. She testified that shortly after the execution of the contract she informed the assistant trust officer of the bank that she had at no time intended to make any of the $300 monthly payments required to be made under the terms of the contract; and that she did not make any payments other than the initial down payment. It also appeared that in 1931 or prior thereto, she instituted an action in the Circuit court for the recovery of the money paid by her on the contract. The fact that a party to a contract abandoned same may be inferred from a course of conduct or circumstances evincing an intention to abandon. Abandonment is shown where, as here, the purchaser absolutely and positively refused to perform the conditions of the contract and expressed an intention to abandon it. The intention of the petitioner was demonstrated by her statements to the officials of the bank that she would not perform her contract and that she did not intend at any time to pay the monthly instalments required thereunder. The additional fact that subsequent to the execution of the contract petitioner instituted litigation to recover her initial down payment is further evidence of her intent to abandon the contract.

A somewhat similar question was before the court in Miller v. Lutz, 190 Ill. 326. In that case Miller, the contract seller, brought an action to declare the contract of purchase null and void and to remove same as a cloud on the title. The contract provided therein, inter, contended as does the petitioner here, that there had not been a declaration of forfeiture of the contract and that therefore the purchaser's rights under the contract were not terminated. The court said at pp. 329, 330:

"Whether or not Miller had at the time the original bill was filed waived his right to forfeiture under the contract without making a demand for payment and serving notice of intention to declare a forfeiture, we do not deem it necessary to determine. It is certain that at the original bill was filed the complainant, by the terms of Miller's deed, a forfeiture of the contract had taken place.

never at any time thereafter paid or tendered to Miller or to Appellees, or either of them, the amount due from him under the contract or thereafter paid any taxes on the property.

"***

"Whatever may have been the rights of Akin under the contract at the time the original bill was filed, we think it clearly appears that all his rights under the contract had been forfeited at the time the amended and supplemental bill was filed by Appellees by reason of his failure to perform or offer to perform the conditions of the contract. (Stuckrath v. Briggs & Turivas, 329 Ill. 555.)"

Under the authority of the Akin case the commencement of the previous suit by petitioner to recover the initial payment made by her on her contract of purchase was sufficient in itself to work a forfeiture of the contract and the seller was entitled to consider the contract as terminated and abandoned.

It does not appear that the bank as selling agent or any of its officers or representatives did anything or said anything to petitioner at any time from which it could reasonably be inferred that the provision in the contract "that the time of payment should be the essence of this contract" would be waived. At no time after petitioner's initial payment and after her refusal to make the subsequent payments did she make any effort to perform the contract of August 20, 1926. In discussing a somewhat similar situation in Stuckrath v Briggs & Turivas, 329 Ill. 555, the court said at p. 566:

"A rescission or abandonment of a contract in writing may be deduced from circumstances or a course of conduct clearly evincing abandonment. Hayes v. Carey, 287 Ill. 274; Lasher v. Loeffler, 190 id. 15; Cuppy v. Allan, 176 id. 162; Hale v. Bryant, 109 id. 34.) The rule requiring notice of forfeiture of a contract for the sale of real estate is based on conduct on the part of the party seeking the benefit of forfeiture which would lead the other party to infer that he was not insisting on time as of the essence of the contract. Upon such state of facts the authorities are uniform that notice and demand must be made before the contract may be forfeited. Such rule has no application here. There has been no showing whatever in the record that Briggs and Turivas did or said anything to plaintiff in error that would indicate the firm was not insisting upon performance of the contract in accordance with its terms as to the time of payment. On the contrary the testimony of Turivas was that he informed plaintiff in error on September 15, 1921, when the first payment was due or the day before that such payment must be made in accordance with the contract or the contract would be terminated. This was notice of an election to insist on a strict performance of the contract according to its terms."

Since the abandonment of the contract by the petitioner in August, 1926, extinguished and waived all her rights thereunder, it

never at any time thereafter paid or tendered to Miller or to Appellants, or either of them, the amount due from the value the contract or thereafter paid any taxes on the property.

***

"Whatever may have been the rights of Allin under the contract at the time the original bill was filed, we think it clearly appears that all his rights under the contract had been forfeited at the time the amended and supplemental bill was filed by Appellees by reason of his failure to perform or offer to perform the conditions of the contract. (Blackwell v. Wiggle & Trevor, 130 Ill. 170.)"

Under the authority of the Allin case the commencement of the previous suit by petitioner to recover the initial payment made by her on her contract of purchase was sufficient in itself to work a forfeiture of the contract and the seller was entitled to consider the contract as terminated and abandoned.

It does not appear that the bank as selling agent or any of its officers or representatives did anything or said anything to petitioner at any time from which it could reasonably be inferred that the provision in the contract "that the time of payment should be the essence of this contract" would be waived. At no time after petitioner's initial payment and after her refusal to make the subsequent payments did she make any effort to perform the contract of August 20, 1926. In discussing a somewhat similar situation in Shuckerow v. Dunlap & Turner, 329 Ill. 577, the court said at p. 586:

"A rescission or abandonment of a contract is evidenced by any act or conduct from circumstances or a course of conduct clearly evidencing abandonment. Lopez v. Carey, 307 Ill. 378; Lerner v. Wachtel, 19 Ill. App. 14, 17; Carr v. Allen, 176 Ill. 160; Sale v. Jones, 107 Ill. App. 24. The rule requiring notice of forfeiture of a contract for the sale of real estate is based on conduct on the part of the party seeking the benefit of forfeiture which would lead the other party to infer that he was not insisting on time as of the essence of the contract. Upon such state of facts the authorities are uniform that notice and demand must be made before the contract may be forfeited. Such rule has no application here. There has been no showing whatever in the record that Dunlap and Turner did or said anything to indicate to Shuckerow that they would insist the time was not insisting upon performance of the contract in accordance with its terms as to the time of payment. On the contrary the testimony of Turner was that he informed plaintiff in error on September 13, 1919, some the first payment was due in the May before that such payment must be made in conformance with the contract or the contract would be terminated. This was notice of an election to insist on a strict performance of the contract according to its terms."

Since the abandonment of the contract by the petitioner in August, 1926, relinquishing and waiving all her rights thereunder, it

was not necessary for the bank to declare a forfeiture to enable it to retain the payment made by petitioner under the contract. By reason of said abandonment she waived her right thereunder to insist upon a declaration of forfeiture and the service upon her by the bank of a written notice of such forfeiture. In Title & Trust Company v. Durkheimer Inv. Co., 155 Ore. 427, 63 Pac. (2d) 909, decided December 29, 1936, the suit involved the validity of the forfeiture and termination of a lease on an office building in Portland, Oregon. The Durkheimer Investment Company, defendant therein, made a lease to certain lessees named Platt for a term of ninety-nine years. The lease required payment of a ground rental of $1,400 each month, obligated the lessees to pay taxes and authorized termination of the lease if any default continued for sixty days after notice. It there appeared that the lessees informed the lessor by letter on May 21, 1932, that they were unable to and could not pay the ground rent of $1,400 a month and the delinquent taxes. The Supreme Court of Oregon held that by virtue of their abandonment of the lease on May 21, 1932, the rights of the lessees thereunder were also abandoned and that no notice to them of their default was necessary. In stating its reason for so holding, the court said at p. 915 of the last above mentioned report:

> "By the declaration of the Platts that they could not pay the rent or the taxes, the lessees not only abandoned the contract and waived the right to notice, but they enabled the defendant to exercise its then ripened right of forfeiture, for to require a notice under such abandonment would be mere idle ceremony."

In Anderson v. Hurlbert, 109 Ore. 284, 219 Pac. 1092, under an almost identical factual situation, the court said at p. 1095 of the report last above mentioned:

> "When Mrs. Anderson, the purchaser, informed Hurlbert, the vendor, that she would not be able to make any more payments the vendor was not required to give the purchaser further notice in order to effect a forfeiture. The plaintiff, Mrs. Anderson, by the abandonment of the contract, waived her right to further notice. To require a notice after such abandonment would be an idle ceremony. Epplett v. Empire Investment Co., Inc., 99 Or. 533, 543, 194 Pac. 461, 700; Mitchell v. Hughes, 80 Or. 574, 157 Pac. 965. The writing of the letter by Mrs. Anderson informing Hurlbert, the vendor, that she would not make further payments, constituted an abandonment of the contract by her as the vendee."

was not necessary for the bank to obtain a forfeiture in order to be repaid the amount owed by instituting only the mortgage. By reason of said abandonment she waived her right thereunder to insist upon a declaration of forfeiture and the service upon her by the bank of a notice and/or of such forfeiture. In Pilla v. Home Savings & Loan Association, 137 Ore. 417, 2 P. (2d) 290, [illegible] 29, 1936, the suit involved the validity of the forfeiture and termination of a lease on an office building in Portland, Oregon. The Burkhalter Investment Company, defendant therein, made a lease to certain lessees named Platt for a term of ninety-nine years. The lease required payment of a ground rental of $1,400 each month, obliged the lessees to pay taxes and authorized termination of the lease if any default continued for sixty days after notice. It there appeared that the lessees informed the lessor by letter on May 21, 1932, that they were unable to and could not pay the ground rent of $1,400 a month and the delinquent taxes. The Supreme Court of Oregon held that by virtue of their abandonment of the lease on May 21, 1932, the rights of the lessees thereunder were also terminated and that no notice to them of their default was necessary. In stating the reason for so holding, the court said at p. 291 of the last above mentioned report:

"By the abandonment of the flats they could not pay the rent or the taxes. The lessees had only abandoned the premises and waived the right to notice, but they needed the defendant to exercise the then vested right of forfeiture, for to require a notice under such abandonment would be mere idle ceremony."

In Anderson v. Burkhart, 109 Ore. 104, 219 P. 1071, under an almost identical factual situation, the court said at p. 1097 of the report last above mentioned:

"Then for, delivery, the plaintiff, Richard Burkhart, the vendor, that the notice to also be given to any person occupying the premises, and not required to give the vendee further notice in order to effect a forfeiture. The validity, then, therefore, of the abandonment of the contract, waived and right to forfeiture notice, to require a notice after such abandonment would be an idle ceremony. Pilla v. Home Savings & Loan Association, 137 Ore. 417, 2 P. (2d) 290; Pilla v. Home Savings & Loan Association, 137 Ore. 417, 2 P. (2d) 290; Pilla v. Home Savings & Loan Association, 137 Ore. 417, 2 P. (2d) 290. The waiving of the notice by Mrs. Anderson indicates, the vendor, that she would not make further payments, constituted an abandonment of the contract, it is as the vendee,

(To the same effect are Kemmerer v. Title & Trust Co., 90 Or. 137; Koch v. Glenn, 63 Idaho 761, 27 Pac. (2d) 870; Cummings v. Rogers, 36 Minn. 317, 30 N. W. 892.)

Petitioner also contends that there was a fiduciary relationship between herself and the bank and its representatives. There is no merit in this contention. The master and chancellor both found that petitioner's claim in this regard was not supported by the evidence and we are in accord with such findings.

We are impelled to hold that by petitioner's abandonment of her contract of August 20, 1926, she rendered unnecessary the declaration or written notice of forfeiture by the bank; that the provisions of the contract with reference to the retention by the bank of the amount paid under same by petitioner became immediately operative upon such abandonment with or without notice; and that the bank had a right to treat the contract as terminated and to retain the payment made by the petitioner thereunder.

For the reasons stated herein the decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Friend and Scanlan, JJ., concur.

(to the same effect are _Lawrence v. Ohio & Lake S._, 70 Or. 127; _Cook v. Olson_, 61 Idaho 761, 77 Pac. 1127; _Gaskins v. Jones_, 34 Miss. 127, 70 A. S. 501.)

Petitioner also contends that there was a fiduciary relationship between herself and the bank and its representatives. There is no merit in this contention. The master and chancellor both found that petitioner's claim in this regard was not supported by the evidence and we are in accord with such findings.

We are impelled to hold that by petitioner's abandonment of her contract of August 20, 1926, she rendered unnecessary the declaration or written notice of forfeiture by the bank that the provisions of the contract with reference to the retention by the bank of the amount paid under cover by petitioner became immediately operative upon such abandonment with or without notice; and that the bank had a right to treat the contract as terminated and to retain the payment made by the petitioner thereunder.

For the reasons stated herein the decree of the circuit court is affirmed.

AFFIRMED.

Pated and Jacobs, JJ., concur.

304 N.E. 411

40935

ELIZABETH JOHNSON,
Appellee,

v.

INDIA TEA COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

39A

304 I.A. 255

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, India Tea Company, seeks to reverse a judgment for $2,000 entered against it upon the verdict of a jury in an action brought by plaintiff, Elizabeth Johnson, for damages for personal injuries received by her as a result of defendant's alleged negligence in the maintenance and operation of its truck, which was involved in a collision with an automobile in which plaintiff was a passenger.

Defendant's sole contention is "that the judgment is manifestly against the weight of the evidence and not sustained by any credible evidence." In other words, it is claimed that there is no evidence in the record to show that defendant was guilty of any negligence which proximately caused or contributed to cause the accident and that plaintiff's injuries were caused solely by the negligence of the driver of the car in which she was riding.

About 8:30 a.m., on June 18, 1936, the accident in question occurred at the intersection of 159th street, which is U. S. Highway No. 6, and LeClaire avenue, in Cook county, Illinois. Plaintiff was a passenger in a car driven by her daughter Eleanor Johnson, which was proceeding east on U. S. Highway No. 6. The Johnsons had been visiting friends in River Grove and their car turned into said highway a considerable distance west of where the accident happened. Plaintiff was sitting in the front seat at the right of the driver and another daughter, Irene Johnson, was riding in the back seat of the car. Defendant's

(COPY)

ELIZABETH JOHNSON,
Appellee,

v.

INDIA TIRE CORPORATION,
a corporation,
Appellant.

APPEAL FROM CHICAGO COURT.
Cook County.

904 I.A. 258

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, India Tire Company, seeks to reverse a judgment for $2,000 entered against it upon the verdict of a jury in an action brought by plaintiff, Elizabeth Johnson, for damages for personal injuries received by her as a result of defendant's alleged negligence in the maintenance and operation of its truck, which was involved in a collision with an automobile in which plaintiff was a passenger.

Defendant's sole contention is "that the judgment is manifestly against the weight of the evidence and not sustained by any credible evidence." In other words, it is claimed that there is no evidence in the record to show that defendant was guilty of any negligence which proximately caused or contributed to cause the accident and that plaintiff's injuries were caused solely by the negligence of the driver of the car in which she was riding.

About 8:30 a.m., on June 18, 1936, the accident in question occurred at the intersection of 127th street, which is U. S. Highway No. 6, and LaGrange avenue, in Cook county, Illinois. Plaintiff was a passenger in a car driven by her daughter Eleanor Johnson, which was proceeding east on U. S. Highway No. 6. The defendant had been visiting friends in River Grove and their car turned into said highway a reasonable distance west of where the accident happened. Plaintiff was sitting in the front seat at the right of the driver and another daughter, Irene Johnson, was riding in the back seat of the car. Defendant's

truck, driven by Robert Millard, was west bound on U. S. Highway No. 6 prior to the time of the collision. To the west of LeClaire avenue U. S. Highway No. 6 slopes upward to the crest of a hill, which was estimated variously as being 25, 100, 125 and 200 feet distant from the point of the collision. The truck standing at the intersection of U. S. Highway No. 6 and LeClaire avenue could not be seen by the driver of the car in which plaintiff was riding until that car coming from the west had reached the crest of the hill, and neither could the driver of the truck, as he reached LeClaire avenue, see the east bound automobile until it reached the crest of the hill. U. S. Highway No. 6 is a two lane paved roadway twenty feet wide. LeClaire avenue is a gravel street. There are ditches on both sides of U. S. Highway No. 6 beyond the shoulders which immediately adjoin said highway on each side.

Defendant's theory of fact, as stated in its brief, is "that while their truck was being driven in a westerly direction on U. S. Highway No. 6 and when it reached LeClaire Street, its driver turned slightly to the south to make a left turn into LeClaire Street and brought his truck to a complete stop in the center of the highway, possibly a little to the left or south of the center line. The car in which the plaintiff was a passenger was driving in an easterly direction on U. S. Highway No. 6 and came over the crest of the hill a short distance west of the scene of the accident. Before the car in which the plaintiff was riding reached the crest of the hill, it was impossible to see the highway on the other side. *** That while its truck was standing in the center of said highway, the car in which the plaintiff was a passenger came over the top of the hill at such a speed that it could not be stopped and crashed into the truck of the defendant while it was still stationary on the highway."

Plaintiff's theory, as stated in her brief, is as follows: "Plaintiff was a passenger in an automobile being driven in an easterly direction on the right hand side of the road. A substantial rise or elevation in the roadway obscured the view to the eastward. The top

truck, driven by Robert Millard, was west bound on U. S. Highway No. 6 prior to the time of the collision. To the west of LeClaire avenue U. S. Highway No. 6 slopes upward to the crest of a hill, which was estimated variously as being 25, 100, 125 and 200 feet distant from the point of the collision. The truck standing at the intersection of U. S. Highway No. 6 and LeClaire avenue could not be seen by the driver of the car in which plaintiff was riding until that car coming from the west had reached the crest of the hill, and neither could the driver of the truck, as he reached LeClaire avenue, see the east bound automobile until it reached the crest of the hill. U. S. Highway No. 6 is a two lane paved roadway twenty feet wide. LeClaire avenue is a gravel street. There are ditches on both sides of U. S. Highway No. 6 beyond the shoulders which immediately adjoin said highway on each side.

Defendant's theory of fact, as stated in its brief, is "that while their truck was being driven in a westerly direction on U. S. Highway No. 6 and when it reached LeClaire Street, the driver turned slightly to the south to make a left turn into LeClaire Street and brought his truck to a complete stop in the center of the highway, possibly a little to the left of north of the center line. The car in which the plaintiff was a passenger was driving in an easterly direction on U. S. Highway No. 6 and came over the crest of the hill a short distance west of the scene of the accident. Before the car in which the plaintiff was riding reached the crest of the hill, it was impossible to see the highway on the other side. *** That while the truck was standing in the center of said highway, the car in which the plaintiff was a passenger came over the top of the hill at such a speed that it could not be stopped and crashed into the truck of the defendant while it was still stationary on the highway."

Plaintiff's theory, as stated in her brief, is as follows:

"Plaintiff was a passenger in an automobile being driven in an easterly direction on the right hand side of the road. A substantial rise or elevation in the roadway obscured the view to the southwest. The car

of the rise is a short distance west of the scene of the accident. The driver of defendant's truck, west bound, not far from the top of the hill, crossed or started to cross the east bound roadway at about the time the car in which plaintiff was a passenger, passed the crest of the hill. The resultant collision of the two vehicles was caused by the negligence of defendant's driver in crossing in front of traffic or in placing his truck in a position of imminent danger to other persons on the highway."

If there is credible evidence in the record from which it could reasonably be found that defendant's driver was guilty of negligence in any of the respects charged in the complaint, then the verdict of the jury was justified. In our opinion there was ample evidence to warrant the jury's verdict.

Defendant's driver said he did not move his truck from the time he stopped same at the intersection preparatory to making a south or left turn into LeClaire avenue until the time of the impact; that when he stopped his truck, it was headed a little to the southwest and part of it was two or three or four inches to the south of the black line or center line of U. S. Highway No. 6; and that as soon as he had stopped his truck he saw the eastbound automobile, in which plaintiff was riding, being driven over the crest of the hill a short distance to the west of him on the south side of the highway. It is highly important that the testimony of defendant's driver that he did not move his truck from the time he stopped same until the time of the impact be considered in connection with the testimony of the other witnesses as to the position of the truck at and immediately prior to the time the cars collided. Eleanor Johnson, the driver of the other car, said the truck was "on my side of the road;" that it was "over half" on her side of the road; that most of it was on the south half of the road; and that it was almost at a standstill "about to make a left turn." Roy Wollan stated that after the crash the body of the truck was on the south side of the road and on cross-examination he said that when the impact took place the truck was completely on the

of the rise is a short distance west of the scene of the accident. The driver of defendant's truck, was found, not far from the top of the hill, crossed or started to cross the east bound roadway at about the time the car in which plaintiff was a passenger, passed the crest of the hill. The resultant collision of the two vehicles was caused by the negligence of defendant's driver in crossing in front of traffic or in placing his truck in a position of imminent danger to other persons on the highway.".

If there is credible evidence in the record from which it could reasonably be found that defendant's driver was guilty of negligence in any of the respects charged in the complaint, then the verdict of the jury was justified. In our opinion there was ample evidence to warrant the jury's verdict.

Defendant's driver said he did not move his truck from the time he stopped same at the intersection preparatory to making a south or left turn into LeClaire avenue until the time of the impact; that when he stopped his truck, it was headed a little to the southwest and part of it was two or three or four inches to the south of the black line or center line of U. S. Highway No. 6; and that as soon as he had stopped his truck he saw the eastbound automobile, in which plaintiff was riding, being driven over the crest of the hill a short distance to the west of him on the south side of the highway. It is highly important that the testimony of defendant's driver that he did not move his truck from the time he stopped same until the time of the impact be considered in connection with the testimony of the other witnesses as to the position of the truck at and immediately prior to the time the cars collided. Eleanor Johnson, the driver of the other car, said the truck was "on my side of the road." Gale H. was "over half" on her side of the road; that most of it was on the south half of the road; and that it was closer to a straightaway "about to make a left turn." Jay Hollon stated that after the crash the body of the truck was on the south side of the road and on cross-examination he said that when the impact took place the truck was completely on the

south side of 159th street "facing south" and that U. S. Highway No. 6 "is wide enough for two cars to pass there but not wide enough for a car to go around a truck which is stopped." Margaret Buckley stated that the cars came together on the south side of the highway, slightly east of LeClaire avenue, and that "he was half on the driveway or thereabouts going south *** it was facing south." A county highway police officer, Charles Glimm, stated that when he arrived shortly after the accident, "the front of the truck was at an angle *** the center of the truck was across the line at an angle also *** the front portion of the truck was over the road *** about the center of the truck." There was evidence that neither the truck nor the automobile had been moved from the positions they were in immediately after the collision until the arrival of the police officers. Plaintiff testified that the truck was "right on our side of the road;" that "half of the truck was over the black line to the south;" and that "it looked like it was going to cross the road but it seems to me he was stopped."

As already stated, defendant's driver testified that he did not move the truck from the time he stopped it until the accident occurred and defendant insists that this is true and it is equally insistent that the collision occurred on the south half of the highway. The collision did unquestionably take place on the south lane of the highway and if plaintiff's driver kept his truck stationary in the position that the several witnesses placed it, with a large portion of said truck protruding to the south over the black line or center line of the highway and the balance of it extending back over the north half of the highway, he was unquestionably guilty of negligence, especially in view of the fact that he was familiar with the neighborhood and knew that he had stopped his truck in such a manner as to partially block both lanes of the highway at the bottom of a hill, where the truck could not be seen by drivers of east bound cars until they reached the crest of said hill.

In its endeavor to account for the failure of plaintiff's

south side of 127th street "facing south" and that U. S. Highway No. 6 "is wide enough for two cars to pass there but not wide enough for a car to go around a truck which is stopped." Sergeant Trotley stated that the cars came together on the south side of the highway, slightly east of Lafleire avenue, and that "he was half on the driveway or shoreabouts going south *** it was facing south." A county highway police officer, Charles Glass, stated that when he arrived shortly after the accident, "the front of the truck was at an angle *** the center of the truck was across the line at an angle also *** the front portion of the truck was over the road *** about the center of the truck." There was evidence that neither the truck nor the automobile had been moved from the positions they were in immediately after the collision until the arrival of the police officers. Plaintiff testified that the truck was "right on our side of the road," that "half of the truck was over the black line in the middle," and that "it looked like it was going to cross the road but it seems to me he was stopped."

As already stated, defendant's driver testified that he did not move the truck from the time he stopped it until the accident occurred and defendant insists that this is true and it is equally insistent that the collision occurred on the south half of the highway. The collision did unquestionably take place on the south lane of the highway and if plaintiff's driver kept his truck stationary in the position that the several witnesses placed it, with a large portion of said truck protruding to the south over the black line or center line of the highway and the balance of it extending back over the north half of the highway, he was unquestionably guilty of negligence, especially in view of the fact that he was familiar with the neighborhood and knew that he had stopped his truck in such a manner as to partially block both lanes of the highway at the bottom of a hill, where the truck could not be seen by drivers of cars bound north until they reached the crest of said hill.

Is its evidence be believed for the failure of plaintiff's

daughter to avert the accident the jury may well have found that as she drove her car over the crest of the hill and first saw defendant's truck, she was immediately confronted with a dilemma by reason of said truck partially occupying both lanes of the highway. In any event whatever negligence, if any, Eleanor Johnson may have been guilty of cannot be imputed to plaintiff.

Since there is ample evidence in the record to sustain the verdict the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

danger to avert the accident the jury may well have found that as she drove her car over the crest of the hill and first saw defendant's truck, she was immediately confronted with a dilemma by reason of said truck partially occupying both lanes of the highway. In any event, whatever negligence, if any, Clemmer thereon may have been guilty of cannot be imputed to plaintiff.

There there is ample evidence in the record to sustain the verdict the judgment of the District court is affirmed.

EDWARD DUFFIE.

Fulton and Fulton, Jr., counsel.

40987

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MARION WILSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to review a judgment of the Municipal court of Chicago wherein and whereby the defendant, Marion Wilson, was sentenced to the House of Correction for nine months and fined $1 on the court's finding that she was guilty of the crime of larceny. Defendant pleaded not guilty and submitted her cause to the court without a jury. Only the common law record is presented.

Defendant first contends that the record shows affirmatively that she was not represented by counsel and that, therefore, the court was not complete and did not have jurisdiction to enter the judgment.

The record does not disclose that a request was made for counsel by defendant and in holding in People v. Porcaro, 358 Ill. 448, that the provision in Section 9 of the Constitution of Illinois that "the accused in a criminal prosecution shall have the right to appear and defend *** by counsel" may be waived, said at p. 451:

> "The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the Municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the Municipal court did not deny a request for the service of counsel." [Italics ours.]

Defendant next contends that the court was without jurisdiction because the record fails to show that she was furnished a copy of the information not less than an hour before the commencement of her trial as provided by Paragraph 736 A of the Criminal Code,

MOREY

Proceeding on the statutory criminal information, defendant on trial.

v.

RAYMOND ELLIOTT, Plaintiff in error.

ERROR TO A MUNICIPAL COURT OF CHICAGO.

304 I.A. 255

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to review a judgment of the municipal court of Chicago wherein and whereby the defendant, Raymond Elliott, was sentenced in the House of Correction for nine months and fined $1 on the court's finding that she was guilty of the crime of larceny. Defendant pleaded not guilty and submitted her cause to the court without a jury. Only the common law record is presented.

Defendant first contends that the record shows affirmatively that she was not represented by counsel and that, therefore, the court was not complete and did not have jurisdiction to enter the judgment.

The record does not disclose that a request was made for counsel by defendant and in holding in People v. Forcero, 398 Ill. 448, that the provision in Section 9 of the Constitution of Illinois that "the accused in a criminal prosecution shall have the right to appear and defend *** by counsel" may be waived, said at p. 452:

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the Municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the Municipal court did not deny a request for the service of counsel." [Italics ours.]

Defendant next contends that the court was without jurisdiction because the record fails to show that she was furnished a copy of the information nor have been an hour before the commencement of her trial as provided by Paragraph 726 A of the Criminal Code,

which reads as follows:

"Every person arrested upon an information or complaint for any criminal offense, or for the violation of any penal ordinance of a Municipal Corporation of this State, SHALL be furnished with a copy of the Information or complaint with which he is charged, not less than one hour previous to his arraignment, hearing or examination."

In passing upon a similar contention, where an indictment for a felony was involved, in People v. O'Hara, 332 Ill. 436, the court held at p. 446:

"The requirement of the statute that every defendant charged with a felony shall be furnished, before his arraignment, a copy of the indictment and a list of jurors and witnesses is directory, only, and in order to make the omission to comply with this requirement available on error the defendant must demand a copy of the indictment and a list of witnesses and preserve the evidence of such demand in a bill of exceptions. (People v. Pennington, 267 Ill. 45.)"

The record does not disclose that defendant made any request or demand for a copy of the information at any time.

The statute under consideration in the O'Hara case, supra, contained the identical language "shall be furnished" as is contained in Paragraph 736 A of the Criminal Code, which defendant claims here made it mandatory to furnish her with a copy of the information without a demand on her part. An examination of the constitutional and statutory provisions bearing on the subject reveals that a defendant has the right to be furnished with a copy of the complaint, information or indictment containing the accusation or charge against him only upon his request or demand.

There being no error in the record the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

which reads as follows:

"Every person arrested upon an information or complaint for any criminal offense, or for the violation of any penal ordinance of a municipal corporation of this state, shall be furnished with a copy of the information or complaint with which he is charged, not less than one hour previous to his arraignment, hearing or examination."

In passing upon a similar contention, where an indictment for a felony was involved, in People v. O'Brien, 332 Ill. 436, the court held at p. 446:

"The requirement of the statute that every defendant charged with a felony shall be furnished, before his arraignment, a copy of the indictment and a list of jurors and witnesses is mandatory, and in order to make the omission to comply with this requirement available on error the defendant must demand a copy of the indictment and a list of witnesses and preserve the evidence of such demand in a bill of exceptions. (People v. Hamilton, 307 Ill. 49.)"

The record does not disclose that defendant made any request or demand for a copy of the information at any time.

The statute under consideration in the [illegible] case contained the identical language "shall be furnished" as is contained in Paragraph 7½ a of the Criminal Code, which defendant claims here made it mandatory to furnish her with a copy of the information without a demand on her part. An examination of the constitutional and statutory provisions bearing on the subject reveals that a defendant has the right to be furnished with a copy of the complaint, information or indictment containing the accusation or charge against him only upon his request or demand.

There being no error in the record the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Friend and Sullivan, J.J., concur.

304 ILL. APP.

40686

FRANCIS M. ALLEN,
Appellant,

v.

SIDNEY H. KAHN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

304 I.A. 256

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Francis M. Allen, holder of bonds in the amount of $6,000 out of an issue of $925,000, of which there were then outstanding bonds in the amount of $843,000 brought his complaint in the Circuit court February 20, 1933, against Melvin L. Straus, individually and as successor trustee; S. W. Straus & Company, the house of issue; Sidney H. Kahn, individually and as a member of the bondholders' protective committee, and Nettie Kahn, his wife, the record owners; Produce Exchange Building Corporation, the mortgagor; M. A. Rosenthal, secretary of the committee, and 1425 South Racine Building Corporation, which was formed by the committee under a reorganization plan and the present owner of the premises, seeking to impeach a foreclosure decree for fraud and to restrain the execution of a reorganization plan and sale thereunder. After service of process in this proceeding, the defendants procured the approval of the sale in the foreclosure proceeding, without notice to the plaintiff, and he thereupon filed his supplemental complaint, seeking to declare as void the sale and redemption thereunder, by which the new corporation acquired title to the property under the reorganization plan. After filing of the several answers of defendants, the cause was referred generally to a master in chancery, who pursuant to a full hearing, recommended that the complaint be dismissed for want of equity. Plaintiff filed numerous exceptions to the master's report, which were overruled, and a decree was entered in accordance with the master's recommendation, from which

304 I.A. 256

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Francis K. Allen, holder of bonds in the amount of $6,000 out of an issue of $250,000, of which there were then outstanding bonds in the amount of $243,000 brought his complaint in the Circuit court February 20, 1910, against Ralph L. Stone, individually and as receiver trustee; S. T. Stone & Company, the house of Stone; Sidney E. Kahn, individually and as a member of the bondholders' protective committee, and Anita Kahn, his wife, the record owners; Produce Exchange Building Corporation, the mortgagor; M. A. Rosenthal, secretary of the committee, and 1425 South Racine Building Corporation, which was formed by the committee under a reorganization plan and the present owner of the premises, seeking to impeach a foreclosure decree for fraud and to restrain the execution of a reorganization plan and sale thereunder. After service of process in this proceeding, the defendants procured the approval of the sale in the foreclosure proceeding, without notice to the plaintiff, and he thereupon filed his supplemental complaint, seeking to declare as void the sale and redemption thereunder, by which the new corporation acquired title to the property under the reorganization plan. After filing of the several answers of defendants, the cause was referred generally to a master in chancery, who pursuant to a full hearing, recommended that the complaint be dismissed for want of equity. Plaintiff filed numerous exceptions to the master's report, which were overruled, and a decree was entered in accordance with the master's recommendation, from which

plaintiff appealed to the Supreme court, contending that a freehold was directly put in issue by the pleadings. Defendants filed a motion in the Supreme court to transfer the cause to this court on the ground that a freehold was not involved. The motion was allowed and the cause is now here for determination upon all the other issues raised by plaintiff.

There is substantially no dispute as to the facts adduced before the master. July 1, 1925, S. W. Straus & Company underwrote a bond issue in the sum of $925,000, to erect a ten-story building for office space and other business facilities in Chicago's produce market at Racine avenue and 14th place. The first five series of coupons, maturing semiannually, were paid through January 1, 1928. When the mortgagor subsequently became delinquent on account of maturing bonds in the amount of $30,000 and certain interest coupons, S. W. Straus & Co. acquired these bonds and coupons from the holders, pursuant to its rights under the provisions of the trust deed, and June 21, 1928, the trustee filed a partial foreclosure against the mortgagor, subject, however, to the continuing lien of the trust deed as to all other outstanding bonds and coupons. A receiver was appointed in that proceeding, also in accordance with the provisions of the trust deed, and a decree was subsequently entered June 26, 1929, finding the amount due and directing that the property be sold. February 27, 1929, before the entry of the decree, the receiver had been ordered by the court to pay the 1927 taxes amounting to some $22,000. Thereafter, August 6, 1929, the property was sold to Sidney H. Kahn, who was associated with the house of issue, subject to the continuing lien of the other outstanding bonds, and a deficiency decree was entered for approximately $69,000, on which there was paid out of the receivership during the period of redemption, by order of court, the sum of $53,000, leaving an unpaid balance of approximately $16,000. There was also distributed from the receivership funds $34,000 on account of defaulted monthly deposits, which was applied - $22,500 on the

plaintiff appealed to the Supreme Court, contending that a freehold was directly put in issue by the pleadings. Defendants filed a motion in the Supreme court to transfer the cause to this court on the ground that a freehold was not involved. The motion was allowed and the cause is now here for determination upon all the other issues raised by plaintiff.

There is substantially no dispute as to the facts adduced before the master. July 1, 1927, S. W. Straus & Company undertook a bond issue in the sum of $925,000, to erect a ten-story building for office uses and other business facilities in Chicago's prominent market at Racine avenue and 14th place. The first five series of coupons, maturing semiannually, were paid through January 1, 1928. Then the mortgagor subsequently became delinquent on account of maturing bonds in the amount of $30,000 and certain interest coupons. S. W. Straus & Co. acquired these bonds and coupons from the holders, pursuant to its rights under the provisions of the trust deed, and June 21, 1928, the trustee filed a partial foreclosure against the mortgagor, subject, however, to the contingent lien of the trust deed as to all other outstanding bonds and coupons. A receiver was appointed in that proceeding, also in accordance with the provisions of the trust deed, and a decree was subsequently entered June 26, 1929, fixing the amount due and directing that the property be sold. February 27, 1929, before the entry of the decree, the receiver had been ordered by the court to pay the 1927 taxes amounting to some $25,000. Thereafter, August 6, 1929, the property was sold to Sidney K. Kahn, who was associated with the house of issue, subject to the contingent lien of the other outstanding bonds, and a deficiency decree for ordinary tax accrued in $29,000, on which there was paid out of the receivership during the period of redemption, by order of court, the sum of $21,000, leaving an unpaid balance of approximately $8,000. There was also derivative from the receivership funds $14,000 on account of defaulted monthly deposits, which was applied - $10,500 on the

$27,000 of interest due July 1, 1929, and $11,500 on the $27,000 due on certain bonds July 1, 1929. The period of redemption expired November 6, 1930.

Subsequent to the partial foreclosure, S. W. Straus & Co. purchased further maturing bonds and coupons from time to time, which were subordinated to all outstanding bonds and coupons, and paid the bondholders all principal and interest due them until July 1, 1931. Because of these advances it thus had an investment subordinate to the other bondholders of some $157,000 in excess of the amounts it received from the partial foreclosure. When the trustee went into possession of the property under the terms of the trust deed, April 30, 1931, there were no unpaid, delinquent taxes, and, in fact, no other delinquencies which had not been paid by the house of issue.

June 3, 1931, after entering into possession of the property, the trustee filed his bill of foreclosure, accelerating the entire indebtedness. Shortly prior thereto a bondholders' committee was organized under a deposit agreement, consisting of persons who were officers of the house of issue, and June 24, 1931, Straus & Co. sent a letter to the bondholders advising them of the depressed conditions of the real estate market, the reduction in rentals of the building and the necessity of readjusting the financial structure of the property. They were told there had been a partial foreclosure proceeding on the bonds and coupons owned by the house of issue under which the property had been acquired by parties associated with Straus & Co.

The foreclosure complaint alleged that title was held by Sidney H. Kahn, but that it was subject to the lien of the bondholders under the trust deed, and the decree of foreclosure and sale entered November 16, 1931, so found. The complaint likewise alleged that Straus & Co. was the owner of certain bonds and coupons, describing them, and that its lien therefor was subject, subordinate and inferior to the lien of all other outstanding bonds and coupons, and the decree

-7-

$47,000 of interest due July 1, 1933, and $11,000 on the $17,000 due on certain bonds July 1, 1939. The period of redemption expired November 6, 1930.

Subsequent to the partial foreclosure, S. T. Strong & Co. purchased further maturing bonds and coupons from time to time, which were subordinated to all outstanding bonds and coupons, and paid the bondholders all principal and interest due them until July 1, 1933. Because of these advances it was an investment admissible to the other bondholders of some $137,000 in excess of the amounts it received from the partial foreclosure. When the trustee went into possession of the property under the terms of the trust deed, April 30, 1931, there were no unpaid delinquent taxes, and, in fact, no other delinquencies which had not been paid by the house of issue.

June 1, 1932, after entering into possession of the property, the trustee filed his bill of foreclosure, acceleration the entire indebtedness. Shortly prior thereto a bondholders' committee and organized under a deposit agreement, consisting of persons who were officers of the house of issue, and June 24, 1932, Strong & Co. sent a letter to the bondholders advising them of the depressed conditions of the real estate market, the reduction in rentals or vacancies and the necessity of readjusting the financial structure of the property. They were told there had been a partial foreclosure proceeding on the bonds and coupons owned by the house of issue under which the property had been acquired by parties associated with Strong & Co.

The foreclosure complaint alleged that title was held by Sidney E. Zahn, but that it was subject to the lien of the bondholders under the trust deed, and the decree of foreclosure and sale entered December 16, 1932, so found. The complaint likewise alleged that Strong & Co. was the owner of certain bonds and coupons, describing them, and that its lien therefor was subject, subordinate and inferior to the lien of all other outstanding bonds and coupons, and the decree

so found and directed the sale of the property.

In February, 1932, the committee by letter advised the bondholders that the full foreclosure proceedings had been carried through to a decree entered November 16, 1931, but that a sale could not be held until arrangements were consummated for a plan of reorganization. Thereafter the personnel of the committee was changed, to include a group of independent business men, including Bertram M. Winston, George W. Rosseter and Jay C. McCord, in addition to Samuel J. T. Straus and Sidney H. Kahn. After Winston's death in February, 1933, he was succeeded by Rufus C. Dawes. The committee as formulated drew up a plan of reorganization, which was sent to the bondholders December 21, 1932, and they were then advised that a date would soon be fixed for sale at which the property would be sold to the highest bidder. Plaintiff received this notice of the plan of reorganization. The sale was held pursuant to the decree, February 8, 1933, and on March 2nd of that year the reorganization plan was presented to the court at the time of the approval of the sale of the premises, and the sale was duly approved by the court pursuant to the plan submitted. The master found and the decree recites that notice of the filing and presentment of the plan was duly given to all parties of record prior to the approval. A few days later, March 7, 1933, S. W. Straus & Co. went into equity receivership. October 27, 1932, title to the property had been conveyed to 1425 South Racine Building Corporation, under the reorganization plan, which was fully consummated the early part of April, 1933.

The gravemen of plaintiff's charge is that the decree of foreclosure and sale was procured by fraud and collusion, and that the organization plan was part of a "fraudulent scheme" to deprive the bondholders of their interest in the real estate. It is first contended that the trustee and the house of issue were remiss in their duty to reveal the defaults which had existed since 1927, and are therefore accountable for the concealment of material facts which resulted in loss to the investors. Plaintiff's counsel say that the

as found and directed the sale of the property.

In February, 1932, the committee by letter advised the bondholders that the full foreclosure proceedings had been carried through to a decree entered November 10, 1931, but that a sale could not be held until arrangements were consummated for a plan of reorganization. Thereafter the personnel of the committee was changed, to include a group of independent business men, including Bertram H. Winston, George W. Rossetter and Jay C. Mooney, in addition to Samuel J. T. Stevens and Sidney K. Klein. After Winston's death in February, 1932, he was succeeded by Martin C. Dance. The committee as formulated drew up a plan of reorganization, which was sent to the bondholders December 21, 1932, and they were then advised that a date would soon be fixed for sale at which the property would be sold to the highest bidder. Plaintiff received this notice of the plan of reorganization. The sale was duly postponed to the twenty, February 8, 1933, and on March 2nd of that year the reorganization plan was presented to the court at the time of the approval of the sale of the premises, and the sale was duly approved by the court pursuant to the plan submitted. The master found and the decree recites that notice of the filing and presentment of the plan was duly given to all parties of record prior to the approval. A few days later, March 7, 1933, E. T. Stevens & Co. went into equity receivership. Under 27, 1932, title to the property had been conveyed to 1405 South Racine Building Corporation, under the reorganization plan, which was fully consummated the early part of April, 1933.

The gravamen of plaintiff's charge is that the decree of foreclosure and sale was procured by fraud and collusion, and that the organization plan was part of a "fraudulent scheme" to deprive the bondholders of their interest in the real estate. It is first contended that the trustee and the house of issue were remiss in their duty to reveal the defaults which had existed since 1927, and are therefore accountable for the concealment of material facts which resulted in loss to the investors. Plaintiff's counsel say that the

"failure to reveal the information until after the collapse of the real estate market, and subsequent to the acceleration of the issue, constituted fraud in equity." No supporting authority is offered for this proposition of law, and it is not suggested what plaintiff or other bondholders could have done to improve their position if they had been fully apprised of the delay or delinquency charged to the trustee and the house. Inferentially it is argued that "if the bondholders knew of the defaults in 1927 they would have been in a position to take some action and would not have waited until after the collapse of the real estate market." This assertion overlooks the fact that the trustee and the house of issue were fully justified under the provisions of the trust deed to pursue the course of action employed. The facts disclosed by the record simply indicate that when the mortgagor failed to meet the requirements imposed by the trust deed during the period prior to July, 1931, Straus & Co. paid the bondholders the interest and principal as it matured and the trustee filed partial foreclosure proceedings as to the bonds and coupons acquired by it, subject to the continuing lien of the bonds and coupons which had not matured. These payments and proceedings were fully authorized under Article II, Section 2 of the trust deed, which specifically imposed the condition upon all bonds and coupons received and held by the bondholders, that in case the house should pay out of its funds to the holders of any bonds the amounts due thereon, "it shall be unnecessary to give notice of any such purchase to the mortgagor, or to the holders of the bonds purchased, or of other bonds or coupons secured thereby, or to anyone else." This provision constituted notice to the plaintiff of the right of the house to acquire bonds and coupons upon which the mortgagor might default, and obviated the necessity of affirmatively notifying him. Moreover, there is nothing to indicate that the bondholders were injured by reason of the advances made by Straus & Co. upon defaulted bonds prior to July 1, 1931, for the amount of these advances, which aggregated some $157,000, was subordinated by Straus & Co. to the continuing lien of

failure to travel the information until after the collapse of the real estate market, and independent of the association of the issue, constituted fraud in equity." No supporting authority is offered for this proposition of law, and it is not suggested what plaintiff or other bondholders could have done in improved similar position if they had been fully apprised of the delay or delinquency charged to the trustee and the house. Inferentially it is argued that "if the bondholders knew of the defaults in July they would have had in a position to take some action and would not have waited until after the collapse of the real estate market." This assertion overlooks the fact that the trustee and the house of issue were fully justified under the provisions of the trust deed to pursue the course of action employed. The facts disclosed by the record simply indicate that when the mortgagor failed to meet the requirements imposed by the trust deed during the period prior to July, 1931, Strong & Co. paid the bondholders the interest and principal as it matured and the trustee filed partial foreclosure proceedings as to the bonds and coupons acquired by it, subject to the existing liens on the bonds and coupons which had not matured. These payments and proceedings were fully [illegible] authorized under Article IX, section 2 of the trust deed, which specifically imposed the condition upon all bonds and coupons received and held by the bondholders, that in case the house should pay out of its funds to the holders of any bonds the amounts due thereon, "it shall be unnecessary to give notice of any such payment to the mortgagor, or to the holders of the bonds purchased, or of other bonds or coupons secured thereby, or to anyone else." This provision established notice to the plaintiff of the right of the house to acquire bonds and coupons upon which the mortgagor might default, and obviated the necessity of affirmatively notifying him. Moreover, there is nothing to indicate that the bondholders were injured by reason of the advances made by Strong & Co. upon defaulted bonds prior to July 1, 1931, for the amount of these advances, which aggregated some "$17,000", was subordinated by Strong & Co. to the continuing lien of

the undefaulted bonds. The suggestion by counsel for plaintiff that knowledge of these defaults prior to 1931, when the market was still stable, would have placed them "in a position to take some action," does not take into account the right of the trustee and the house of issue, under the provisions of the trust deed, to acquire the defaulted bonds, as they did; it does not suggest that the bondholders could have avoided the exercise of this right by the house and the trustee; nor does it indicate, except by inference, that the bondholders would have been in any better position if they had been notified. As a matter of fact, notice to them would have tended to jeopardize the value of their securities and the project securing them, and the trustee and the house were justified in considering the possible serious consequences of such notice in arriving at their decision, in good faith, to acquire the bonds and in proceeding as they did, in the hope that an improvement in the real estate and security market would ultimately justify their course of action. We think there was no duty imposed upon the trustee or the house of issue, by the trust deed or by reason of any equitable principles, as plaintiff contends, to inform bondholders of any delinquencies of the mortgagor.

A second contention is that the interest of Melvin L. Straus, who was associated with the house as an officer, became adverse to his position as trustee for the bondholders. This claim is predicated upon circumstances showing that the house of issue, of which the trustee was an officer, acquired the equity; that the house was the owner of certain bonds and coupons; and that the house, and therefore the trustee, was interested in postponing the taking of possession by the trustee after Sidney H. Kahn had acquired title to the property in November, 1930. It is argued that the representation made in the complaint in the full foreclosure proceeding, that Sidney H. Kahn was the owner of the property, and that the interest of the trustee was not in conflict with his duties to the bondholders, was such a fraud upon the court as to render the decree which was subsequently entered fraudulent and void. The pleadings do not sustain this

the mortgaged bonds. The suggestion by counsel for plaintiff that knowledge of these defaults prior to 1932, when the bonds was still stable, would have placed them "in a position to take some action," does not rule into account the right of the trustee and the duties of issue, under the provisions of the trust deed, to acquire the defaulted bonds, as they did; it does not suggest that the bondholders would have avoided the exercise of this right by the honds and the trustee; nor does it indicate, except by inference, that the bondholders would have been in any better position if they had been notified. As a matter of fact, notice to them would have tended to jeopardize the value of their securities and the project securing them, and the trustee and the honds were justified in considering the possible serious consequences of such notice in arriving at their decision, in good faith, to acquire the bonds and in proceeding as they did, in the hope that an improvement in the real estate and security market would ultimately justify their course of action. We think there was no duty imposed upon the trustee or the honds of issue, by the trust deed or by reason of any equitable principle, to disclosure, in inform bondholders of any deficiencies of the mortgagor.

A second contention is that the interest of Melvin H. Stone, who was associated with the honds as an officer, became adverse to his position as trustee for the bondholders. This claim is predicated upon circumstances showing that the honds of issue, of which the trustee was an officer, acquired the equity that the honds, the owner of certain bonds and coupons; and that the honds, and therefore the trustee, was interested in postponing the taking of possession by the trustee after Sidney H. Hohn had acquired title to the property in November, 1930. It is urged that the representations made in the complaint in the full foreclosure proceeding, that Sidney H. Hohn was the owner of the property, and that the interest of the trustee was not in conflict with his duties to the bondholders, was such a fraud upon the court as to render the decree which was subsequently entered fraudulent and void. The pleadings do not contain this

position. The trustee in his complaint alleged that Sidney H. Kahn held title to the property, but that the interest derived thereby was subject and subordinate to that of the bondholders, and the decree which the trustee subsequently procured, so found. The property was later sold under the decree, thereby enforcing the priority claim of the bondholders.

The contention that conflicts between the interests of the trustee and the bondholders arose, by reason of the fact that the house of issue owned some of the bonds and coupons, is likewise untenable. The trustee's complaint in the foreclosure case alleged that the lien as to all the bonds owned by the house of issue was junior and subordinate to the lien of the trust deed as to all of the other outstanding bonds, and the decree entered in the foreclosure proceeding so found. The deficiency decree provided a deficiency for the unsubordinated bonds and then established a subordinate deficiency for the bonds held by the house of issue. Thus, the trustee did nothing unusual or improper in foreclosing the trust deed; he established the amount of the indebtedness, provided for the sale of the property, and placed the bonds of the house of issue on a subordinate basis.

The third contention is that the house of issue, and therefore the trustee, who was one of its officers, was interested in postponing as long as possible the taking possession of the property by the trustee for the benefit of the bondholders, so that the owner might collect the rents for its benefit. There is no proof to sustain this charge. The courts have frequently held that a trustee is not bound to institute foreclosure proceedings at the earliest possible date. (Conover v. Guarantee Trust Co., 88 N. J. Eq. 450; New York Security & Trust Co. v. Lincoln St. Ry. Co. et al., 74 Fed. 67, 69; Rhode Island Hospital Trust Co. v. S. H. Greene & Sons Corp., 50 R. I. 305.) In support of his argument plaintiff says that although Kahn obtained title on November 6, 1930, the trustee did not take possession immediately, but he totally ignores the fact that interest was paid

position. The trustee in his complaint alleged that Sidney N. Kane held title to the property, but that the interest derived thereby was subject and subordinate to that of the bondholders, and the decree which the trustee subsequently procured, so found. The property was later sold under the decree, thereby enforcing the priority claim of the bondholders.

The contention that conflicts between the interests of the trustee and the bondholders arose, by reason of the fact that the house of issue owned some of the bonds and coupons, is likewise untenable. The trustee's complaint in the foreclosure case alleged that the lien as to all the bonds owned by the house of issue was junior and subordinate to the lien of the trust deed as to all of the other outstanding bonds, and the decree entered in the foreclosure proceeding so found. The deficiency decree provided a deficiency for the unsubordinated bonds and then established a subordinate deficiency for the bonds held by the house of issue. Thus, the trustee did nothing unusual or improper in foreclosing the trust deed; he established the amount of the indebtedness, provided for the sale of the property, and placed the bonds of the house of issue on a subordinate basis.

The third contention is that the house of issue, and therefore the trustee, who was one of its officers, was interested in postponing as long as possible the taking possession of the property by the trustee for the benefit of the bondholders, so that the owner might collect the rents for its benefit. There is no proof to sustain this charge. The courts have frequently held that a trustee is not bound to institute foreclosure proceedings at the earliest possible date. (Cooper v. Guarantee Trust Co., 82 N. J. Eq. 495; New York Security & Trust Co. v. Lincoln St. Ry. Co. et al., 74 Fed. 67; Three Island Bridge Trust Co. v. S. T. Crane & Sons Corp., 10 A. L. R. 95.) In support of his argument plaintiff says that although the obligations title on December 1, 1929, the trustee did not take possession immediately, but he totally ignores the fact that interest was paid

January 1, 1931, and there is no evidence that the owner of the property did not apply all the receipts therefrom in accordance with the trust deed, or that the bondholders sustained any damage by reason of the fact that the trustee did not take possession at an earlier date. The fact is that the trustee went into possession April 30, 1931, and thereupon promptly foreclosed, and the court was advised by the pleadings that the bondholders received all principal and interest due up to July 1, 1931, two months after possession was taken.

Complaint is also made that the trustee's account was approved in a proceeding to which the bondholders were not made parties. Since this was an accounting between the trustee in possession and the mortgagor, to ascertain the amount of the mortgagor's indebtedness for which the property would be liable and sold, the bondholders were not necessary to the approval of the account. No showing was made to indicate that there was anything wrong with the account, or that it was fraudulent, and since there were some 1,350 widely scattered bondholders, it was impractical if not impossible to make all of them parties to a foreclosure proceeding in order to have the account of the trustee in possession approved.

It is next urged that the sale and redemption were part of the fraudulent scheme to deprive the bondholders of the value of their securities, and to place the Straus interests in control of the property, and that plaintiff is thereby entitled to the equitable relief sought. It is here argued that in the letter of Straus & Co. to the bondholders of June 24, 1931, "the bondholders were lured in to deposit their bonds" upon the representation that immediate steps would be taken toward readjustment of the financial structure of the property in the interest of the bondholders, and that a committee had been created for the purpose of acting in that capacity, and that, after assuring the bondholders that in any reorganization effected the position of Straus & Co. would be junior, a plan was adopted which gave a parity in interest to Straus & Co. to the extent of 10%, vested

January 1, 1931, and there is no evidence that the owner of the property did not apply all the receipts thereform in accordance with the trust deed, or that the bondholders sustained any damage by reason of the fact that the trustee did not take possession at an earlier date. The fact is that the trustee went into possession April 30, 1931, and thereupon promptly foreclosed, and the court was advised by the pleadings that the bondholders received all principal and interest due up to July 1, 1931, two months after possession was taken.

Complaint is also made that the plaintiff's petition was approved in a proceeding to which the bondholders were not made parties. Since this was an accounting between the trustee in possession and the mortgagor, in ascertaining the amount of the mortgagor's liabilities for which the property would be liable and sold, the bondholders were not necessary to the approval of the account. No showing was made to indicate that there was anything wrong with the account, or that it was fraudulent, and since there were some 1,700 widely scattered bondholders, it was impractical if not impossible to make all of them parties to a foreclosure proceeding in order to have the account of the trustee in possession approved.

It is next urged that the sale and redemption were part of the fraudulent scheme to deprive the bondholders of the value of their securities, and to place the Atlanta interests in control of the property, and that plaintiff is thereby entitled to the equitable relief sought. It is more argued that in the letter of April 4, to the bondholders of June 24, 1931, "

to dispute their power upon the foreclosure

would be taken toward redemption of the

property in the interest of the bondholders

been created for the purpose of acting in

after assuring the bondholders that in any

the position of Atlanta & Co., would be quite

pare a party in interest to Atlanta & Co.

control of the property in the committee for ten years, and incumbered the estate with fees and expenses, contrary to an agreement not to charge fees. The master to whom the cause was referred and later the chancellor had full opportunity to compare the interests allocated to S. W. Straus & Co., in view of the amount which it had paid in, with the interest allocated to the bondholders on the basis of their investment, and they were evidently both of the opinion that it was not an unreasonable allocation. In so holding the master and the chancellor evidently took into account the fact that under the reorganization plan the 10% given the house of issue was treated less favorably than the 90% allocated to bondholders, for it provided that the proceeds of any first mortgage to permit a cash distribution to the holders of trust certificates could not be distributed on the 10% of the trust certificates to be issued on account of the equity. Moreover, it has been a common practice in reorganizations in this and other states to pay the owners of the equity a reasonable amount for acquisition of their interest in the property, so as to obviate the necessity of abiding the long period of time provided by the statute for redemption, and thus facilitating the reorganization plan. In First National Bank v. Bryn Mawr Building Corp., 365 Ill. 409, a plan which allocated to the owner of the equity 10% was approved by the court.

In considering the charge that the committee "encumbered the property with fees and expenses, contrary to their agreement not to charge fees," we find that the letter of June 24, 1931, advised the bondholders that the original members of the committee, who were officers of the house, would charge no fees for their services, but nothing was said, and obviously no representation could be made that the services of the depositary would be made available to the bondholders without charge. The original committee was later changed, as heretofore stated, to afford outside representation, and proper amendments were made to provide for fees for the new committee members. Any bondholder dissatisfied with the amendment had ample opportunity for the withdrawal

control of the property in the committee for ten years, and increased the estate with fees and expenses, contrary to an agreement not to charge fees. The matter to whom the course was referred had taken the committee but full opportunity to examine the interests alleged to, I, I have a do., in view of the manner which it was paid in, with the interest already in the beneficiary on the basis of their interest in- vestment, and they were evidently both of the opinion that it was not an unreasonable allocation. In so holding the master and the chancellor evidently took into account the fact that under the reorganization plan the 10% given the bonds of issue was treated less favorably than the 20% allocated to bondholders, for it provided that the proceeds of any first mortgage to permit a cash distribution to the holders of junior securities could not be distributed on the 10% of the lower certifi- cates to be issued on account of the equity. Moreover, it has been a common practice in reorganizations in this and other states to pay the owners of the equity a reasonable amount for expenditure of time in the property, so as to obviate the necessity of paying the long period of time provided by the courts for adjudication, and thus facilitating the reorganization plan. In First National Bank v. Pure Oil Co., 301 Ill. 109, a plan with allowance to the owner of the equity 10% was approved by the court.

In considering the charge that the committee "mortgaged the property with fees and expenses, contrary to their agreement not to charge fees," we find that the letter of June 24, 1933, advised the bondholders that the original members of the committee, who were affiliate of the owner, would charge no fees for their services, but nothing was said, nor obviously no representation could be made that the services of the depositary would be made available to the bondholders without charge. The original committee was later changed, as heretofore stated, to allow outside representation, and proper compensation was made to provide for fees for the new committee members. Any inequities illustrated with the amendment had ample opportunity for the attorneys

of his bonds. Plaintiff, however, had never deposited his bonds, as had some 91% of the other bondholders, and therefore the question of withdrawal and the requirements for withdrawal were none of his concern. Moreover, the fairness of identical provisions for withdrawal were upheld in Himmel v. Straus, 288 Ill. App. 566, wherein rights of a depositor of bonds, and not one who had refused to become a depositor, were considered.

The last contention under this heading is general in its nature and is predicated upon the charge that bondholders were coerced to become depositors by statements in the letter of the bondholders' committee, "that there will be no bidders at the sale except the Committee; that nondepositors will receive the share of the bid of the committee, minus all foreclosure expenses; and that the share of the depositor will exceed greatly the share of the nondepositors." This charge is not justified, as will appear from the following excerpt taken from the committee's letter: "Under prevailing conditions it is probable that no outside bid reflecting what the committee regards as a fair value for the mortgaged property will be made at the forthcoming foreclosure sale by any outsider, and, therefore, the committee, in order to protect the depositing first mortgage bondholders, and in order to prevent the purchase of the property at an inadequate price, will probably bid in the property. *** In the opinion of the committee the amount to be received by nondepositing bondholders will be substantially less than the value of the new securities to be received by depositors."

Another contention advanced by plaintiff is that the filing of his complaint in this proceeding was lis pendens, rendering all proceedings thereafter null and void. His counsel say that the filing of the complaint in the collateral proceeding required defendants to serve him with notice of all steps taken in the foreclosure, and that failure to give him notice deprived him of an opportunity to appear and contest the approval of the sale, and of the value of his security.

of his bonds. Plaintiff, however, had never deposited his bonds, as had some 91% of the other bondholders, and therefore the question of validity and the requirements for withdrawal were none of his concern. Moreover, the fairness of identical provisions for withdrawal were upheld in Dodge v. Ogburn, 292 Ill. 519, where certain rights of a depositor of bonds, and not one who had refused to become a depositor, were considered.

The last contention under this heading is general in its nature and is predicated upon the theory that bondholders were invited to become depositors by statements in the letter of the bondholders' committee, "that there will be no bidders at the sale except the committee; that nondepositors will receive the share of the net of the committee, minus all foreclosure expenses; and that the share of the depositor will exceed greatly the share of the nondepositors." This charge is not justified, as will appear from the following excerpts taken from the committee's letter: "Under prevailing conditions it is probable that no outside bid reflecting what the committee reports is a fair value for the mortgaged property will be made at the foreclosure proceedings sale by any outsider, and, therefore, the committee, in order to protect the depositing first mortgage bondholders, and in order to prevent the purchase of the property at an inadequate price, will probably bid in the property. *** In the opinion of the committee the amount to be received by nondepositing bondholders will be substantially less than the value of the new securities to be received by depositors."

Another contention advanced by plaintiff is that the filing of his complaint in this proceeding was his tender, validating his proceedings therefor null and void. His counsel say that the filing of the complaint in the collateral proceeding required defendants to have him with notice of all steps taken in the foreclosure, and that failure to give him notice deprived him of an opportunity to appear and contest the approval of the sale, and of the value of his security,

The master found that notice of the application for approval of the sale was given to all parties of record, and that the order approving the sale was entered upon proper notice. It is undisputed that plaintiff knew of the pendency of the foreclosure proceeding since February 5, 1932, and he had also known since December 21, 1932, that a plan of reorganization had been adopted and that the date for sale of the property would soon thereafter be determined. Nevertheless, plaintiff filed his complaint after the sale was had and after he had been able to ascertain the amount that he would receive from the proceeds thereof. He could easily have intervened in the foreclosure proceeding to contest the sale, as plaintiffs did in numerous other cases which have been brought here on appeal, in which the same counsel represented the interveners. He chose, however, to let the sale be held without objection, and to lodge his attack collaterally upon the decree and sale in an independent proceeding. In order to prevail in such a proceeding it was incumbent upon plaintiff to show that actual fraud permeated the foreclosure proceeding, and that fraud was practiced upon the court, with the result that a fraudulent decree was obtained. In this respect plaintiff has failed to make any showing of actual fraud, or that a different decree would have resulted under foreclosure by a different trustee.

Various other contentions made by plaintiff are of a similar nature to those advanced in Himmel v. Straus, 288 Ill. App. 566, which were determined adversely to plaintiff in that proceeding. We there considered a complaint filed by a small percentage of first mortgage bondholders to set aside a foreclosure decree and plan of reorganization, to which they had failed to object when given the opportunity, and approved the dismissal of a bill for want of equity where it appeared that the allegations contained therein were not supported by evidence. We held that every presumption is in favor of the validity of foreclosure proceedings; that the trustee of a trust indenture is held to exercise only an honest and sound judgment as to the time to foreclose; that where the trust deed did not require trustee's attendance at fore-

The master found that notice of the application for approval of the sale was given to all parties of record, and that the order approving the sale was entered upon proper notice. It is undisputed that plaintiff knew of the pendency of the foreclosure proceeding since February 5, 1932, and he had also known since December 23, 1932, that a plan of reorganization had been adopted and that the date for sale of the property would soon thereafter be determined. Nevertheless, plaintiff filed his complaint after the sale was had and after he had been able to ascertain the amount that he would receive from the proceeds thereof. He could easily have intervened in the foreclosure proceeding to contest the sale, as plaintiffs did in numerous other cases which have been brought here on appeal, in which the same counsel represented the intervenors. He chose, however, to let the sale be held without objection, and to lodge his attack collaterally upon the decree and sale in an independent proceeding. In order to prevail in such a proceeding it was incumbent upon plaintiff to show that actual fraud permeated the foreclosure proceeding, and that fraud was practiced upon the court, with the result that a fraudulent decree was obtained. In this respect plaintiff has failed to make any showing of actual fraud, or that a different decree could have resulted under foreclosure by a different trustee.

Various other contentions made by plaintiff are of a similar nature to those advanced in Tunnel v. Stevens, 358 Ill. 499, which were determined adversely to plaintiff in that proceeding. We there considered a complaint filed by a small percentage of first mortgage bondholders in and while a foreclosure decree and plan of reorganization, to which they had failed to object when given the opportunity, and approved the dismissal of a bill for want of equity where it appeared that the allegations contained therein were not supported by evidence. We held that every presumption is in favor of the validity of foreclosure proceedings; that the trustee of a trust indenture is held to exercise only an honest and sound judgment as to the time to foreclose; that where the trust deed did not require trustee's attorneys as foreclosure

closure sale, his failure to attend cannot be charged as a violation of duty. The defendant in that proceeding was also S. W. Straus & Co. Many of the same charges here leveled against the trustee, relating to conflicts of interests between the house of issue and the trustee were there discussed and determined. Plaintiff in that proceeding was also represented by counsel who filed the complaint in the case at bar, and many of the same charges of fraud, misrepresentation and collusion, as are made in this case, were there lodged against the defendant and discussed in our opinion. Plaintiff seeks to distinguish the Himmel case from the case at bar in several respects, but we have considered his suggestions and think that the conclusions reached in the Himmel case cover substantially all the remaining contentions here made.

The record does not disclose any fraud in the foreclosure proceeding, in the plan of reorganization, or in the reorganization of the property, nor are the trustee, the house of issue or the members of the bondholders' committee guilty of any wrongdoing, upon the record presented. Consequently, plaintiff is not entitled to any damages under his prayer for an accounting, or to any equitable relief. The decree of the Circuit court dismissing plaintiff's bill of complaint herein for want of equity is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

disaster sale, his failure to attend auctions be charged as a violation of duty. The defendant in that proceeding was also S. V. Stress & Co. Many of the same charges were levied against the trustees, relating to conflicts of interests between the terms of leases and the trustees were there discussed and determined. PLAINTIFF in that proceeding was also represented by counsel who filed the complaint in the case at bar, and many of the same charges of fraud, misrepresentation and collusion, as are made in this case, were there lodged against the defendant and discussed in our opinion. Plaintiff seeks to distinguish the Ilsenfl case from the case at bar in several respects, but we have considered his suggestions and hold that the conclusions reached in the Ilsenfl case were sufficiently all the remaining conclusions here made.

The record does not disclose any fraud in the foreclosure proceeding, in the plan of reorganization, or in the reorganization of the property, nor are the trustees, the lessee of lease or the members of the bondholders' committee guilty of any wrongdoing, upon the record presented. Consequently, plaintiff is not entitled to any damages under his prayer for an accounting, or to any equitable relief. The decree of the circuit court dismissing plaintiff's bill of complaint herein for want of equity is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

40767

MARIE RODAK,
Appellant,

v.

HARRY B. COHEN and
EDITH COHEN,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Marie Rodak, plaintiff, brought an action for damages against Harry B. Cohen and Edith Cohen, his wife, charging slander, false imprisonment and the taking of $80 belonging to plaintiff. At the close of plaintiff's case the court directed a verdict in favor of defendants and entered judgment accordingly. Plaintiff appeals.

The facts essential to a consideration of the issues involved disclose that plaintiff was engaged by defendants as a housemaid and cook in February, 1936. July 5th of that year, after she had prepared breakfast, Edith Cohen, one of the defendants, ordered her to get out of the house, called her a thief and charged her with having stolen linens, napkins and underwear belonging to defendants. Defendant Harry B. Cohen also called plaintiff a thief, and charged her with having stolen linens and other things belonging to defendants, and she was ordered to leave the household forthwith. Plaintiff denied the theft and in the course of the controversy Mr. Cohen threw plaintiff's suitcase out on the rear porch and ordered her to leave the household. She refused to leave, claiming that a week's wages were in arrears and unpaid. Mr. Cohen thereupon called the police, who arrived shortly thereafter, and plaintiff charges that the accusations were repeated in the presence of the police officers, who, upon her refusal to leave, took her to the Hyde Park police station, where she was detained for about two hours. No complaint having been filed by defendants, she was thereafter released. Plaintiff claimed that she had $80 in cash in her suitcase,

MARIE RODAK,

Appellant,

v.

HARRY B. COHEN and
ANNIE COHEN,

Appellees.

APPEAL FROM SULLIVAN COUNTY.

COOK COUNTY.

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

Marie Rodak, plaintiff, brought an action for damages against Harry B. Cohen and Annie Cohen, his wife, charging slander, false imprisonment and the taking of $30 belonging to plaintiff. At the close of plaintiff's case the court directed a verdict in favor of defendants and entered judgment accordingly. Plaintiff appeals.

The facts essential to a consideration of the issues involved disclose that plaintiff was employed by defendants as a housemaid and cook in February, 1936. July 5th of that year, after she had prepared breakfast, Edith Cohen, one of the defendants, ordered her to get out of the house, called her a thief and charged her with having stolen linens, napkins and underwear belonging to defendants. Defendant Harry B. Cohen also called plaintiff a thief, and charged her with having stolen linens and other things belonging to defendants, and she was ordered to leave the household forthwith. Plaintiff denied the theft and in the course of the controversy Mr. Cohen threw plaintiff's suitcase out on the rear porch and ordered her to leave the household. She refused to leave, claiming that a week's wages were in arrears and unpaid. Mr. Cohen thereupon called the police, who arrived shortly thereafter, and plaintiff charges that the accusations were repeated in the presence of the police officers, who, upon her refusal to leave, took her to the Hyde Park police station, where she was detained for about two hours. No complaint having been filed by defendants, she was thereafter released. Plaintiff claimed that she had $30 in cash in her suitcase,

the proceeds of rents collected from a building owned by her, and that when she recovered her suitcase from the porch the money was gone. There is no evidence, however, tending to prove that either of the defendants took or knew anything about the money.

The cause was tried on two counts contained in the third amended complaint, the first of which alleged in substance that prior to July 5, 1936, she was employed by defendants as a housemaid and cook; that she was a person of good name, fame, credit and reputation, and enjoyed the esteem of her friends and neighbors; that defendants, knowing these circumstances, and with intent to maliciously injure her reputation, did on the day in question charge plaintiff with having stolen table linens belonging to them; that the charges were false, untrue and malicious; that on order of defendants she was taken in custody by the police and held a prisoner for two hours in the Hyde Park police station; that defendants did not obtain any warrant or complaint against her, and she was shortly released; that by reason of the charges made against her and her subsequent arrest plaintiff's health became impaired and she was no longer able to work in the capacity of cook and housemaid; that her suitcase was ransacked and $80 in money was taken therefrom. Plaintiff does not even argue that this count was established.

The third amended count two charged that on the day in question the Cohens falsely and maliciously, and without any cause or justification, accused plaintiff of having stolen table linens from their home in Chicago, where plaintiff was employed; that defendants called the police and accused her of having stolen linens, and on order of defendants she was arrested by the police, taken to the Hyde Park police station and there held a prisoner on order of defendants for upward of two hours; that no warrant or complaint was procured for her arrest, and she was subsequently released; that plaintiff was and is innocent of the charges made against her; that her suitcase was ransacked by defendants and $80 in cash taken therefrom which belonged to her; and that by reason of these charges and her arrest, plaintiff's health became impaired and she was compelled to have medical aid in an attempt to regain her health. Defendants categorically denied all the allegations in the third amended complaint.

the proceeds of rents collected from a building owned by her, and that when she recovered her suitcase from the porch the money was gone. There is no evidence, however, tending to prove that either of the defendants took or knew anything about the money.

The cause was tried on two counts contained in the third amended complaint, the first of which alleged in substance that prior to July 3, 1936, she was employed by defendants as a housemaid and cook; that she was a person of good name, fame, credit and reputation, and enjoyed the esteem of her friends and neighbors; that defendants, knowing these circumstances, and with intent to maliciously injure her reputation, did on the day in question charge plaintiff with having stolen table linens belonging to them; that the charges were false, malicious and malicious; that on order of defendants she was taken in custody by the police and held a prisoner for two hours in the Hyde Park police station; that defendants did not obtain any warrant or complaint against her, and she was shortly released; that by reason of the charges made against her and her subsequent arrest plaintiff's health became impaired and she was no longer able to work in the capacity of cook and housemaid; that her reputation was impaired and $50 in money was taken therefrom. Plaintiff does not seek damages that such arrest was unjustified.

The third amended count two charged that on the day in question the defendants falsely and maliciously, and without any cause or justification, accused plaintiff of having stolen table linens from their home in Chicago, where plaintiff was employed; that defendants called the police and accused her of having stolen linens, and on order of defendants she was arrested by the police, taken to the Hyde Park police station and there held a prisoner on order of defendants for upward of two hours; that no warrant or complaint was procured for her arrest, and she was subsequently released; that plaintiff was and is innocent of the charges made against her; that her reputation was impaired by defendants and $50 in cash taken therefrom which belonged to her; and that by reason of these charges and her arrest, plaintiff's health became impaired and she was compelled to have medical aid in an attempt to restore her health. Defendants unjustifiably denied all the allegations in the third amended complaint.

The following testimony, pertinent to the issues involved, was adduced upon the hearing by plaintiff:

"Well, I got up in the morning and I prepared the breakfast, and Mrs. Cohen come in the kitchen and told me, Marie you got to get out immediately. I said, why do I have to get out? She said, you stole my linens, table cloth and napkins and my underwear. I said, if I did why didn't you search me? And Mr. Cohen came, he says, if you don't get out I will call the police for you. I said, if I do anything wrong, I steal table cloth and linens and your underwears, so search me and I know what to do. And I don't have anything stolen in my life. Nobody -

"And Mr. Cohen go to the telephone and call the police, and the police came in five or ten minutes, and come to my room and told me, you got to pack your clothes and we are going to take you with us. I said, why do you want me to take me with you? He said, because Mr. and Mrs. Cohen claim you stole linens, napkins and underwears.

"Mr. Sherwin (attorney for plaintiff): Q. When Mrs. Cohen said you had stolen her linens, what did you say to her?

"A. I told her she should search me if I stole anything. They call me thief and everything.Ididn't steal anything."

On cross-examination, plaintiff testified (subject to defendants' motion to strike her statement as being unresponsive) as follows:

"Mr. Baumgartner: Q. All right, we will put it: Another reason that you didn't leave was because you wanted to collect some money you said you due you, is that right?

"A. My clothes was not ready to go, and he said, you got to get out, you are a thief.

"Mr. Baumgartner: I move to strike out the unresponsive answer and ask the Court to instruct the witness to answer my question yes or no.

"Mr. Sherwin: Wait a minute, your Honor. You heard what she said; your Honor you will see the connection. Because they called her a thief —

"The Witness: He said, you got to leave, you are a thief.

"Mr. Baumgartner: I move to strike out the statement of the witness.

"A. Mr. Cohen go to the telephone to call the police. He had a talk with me first. He said, you have to get out right this minute, if you don't I will call the police; you are a thief, he said. I said, what did I stole?"

It is, of course, fundamental in our law that in order to render a defamation charge actionable, there must be a publication thereof, that is, the slanderous charges must be uttered in the presence and hearing of others than the plaintiff. (36 Corpus Juris 1223, section 169, p. 1224, sec. 172; Frank v. Kaminsky, 109 Ill.

The following testimony, pertinent to the issues involved, was adduced upon the hearing by plaintiff:

"Well, I got up in the morning and I prepared the breakfast, and Mrs. Cohen came in the kitchen and told me, Marie you got to get out immediately. I said, why do I have to get out? She said, you stole my linens, table cloth and napkins and my underwear. I said, if I did why didn't you search me? And she, Cohen came, he said, if you don't get out I will call the police for you. I said, if I do anything wrong, I steal table cloth and linens and your underwears, so search me and I know what to do. And I don't have anything stolen in my life. Nobody -

"And Mr. Cohen go to the telephone and call the police, and the police came in five or ten minutes, and came to my room and told me, you got to pack your clothes and we are going to take you with us. I said, why do you want me to take me with you? He said, because Mr. and Mrs. Cohen claim you stole linens, napkins and underwears.

"Mr. Sherwin (attorney for plaintiff): Q. Then Mrs. Cohen said you had stolen her linens, what did you say to her?

"A. I told her she should search me if I stole anything. They call me thief and everything. I didn't steal anything."

On cross-examination, plaintiff testified (and) set to defendants' motion to strike her statement as being unresponsive) as follows:

"Mr. Baumgartner: Q. All right, we will put it: Another reason that you didn't leave was because you wanted to collect some money you said you due you, is that right?

"A. My clothes was not ready to go, and he said, you got to get out, you are a thief.

"Mr. Baumgartner: I move to strike out the unresponsive answer and ask the Court to instruct the witness to answer by yes or no.

"Mr. Sherwin: Wait a minute, your Honor. You heard what she said; your honor you will see the connection. Because they called her a thief —

"The Witness: He said, you got to leave, you are a thief.

"Mr. Baumgartner: I move to strike out the statement of the witness.

"A. Mr. Cohen go to the telephone to call the police. He had a talk with me first. He said, you have to get out right this minute, if you don't I will call the police; you are a thief, he said. I said, what did I stole?"

It is, of course, fundamental in our law that in order to render a defamation charge actionable, there must be a publication thereof, that is, the slanderous charges must be uttered in the presence and hearing of others than the plaintiff. (36 Corpus Juris 1221, section 149, p. 1184, see, also, Frame v. Bumpsey, 107 111.

26; Heller v. Howard, 11 Ill. App. 554; Meise v. Meissner, 171 Ill. App. 597.) Under plaintiff's own testimony the charges that she had stolen linens and other effects belonging to defendants were directed to plaintiff with no other person present in the home. According to plaintiff's testimony these charges were first made by Mrs. Cohen in one room, with the husband not present, and later repeated by Mr. Cohen in another room, with his wife not present, but even if they had been made by both defendants in the presence of each other, and in the absence of any other person, the utterances would not constitute publication, because under the well established rule such a communication has been held an insufficient publication. In 17 Ruling Case Law 316, the author says that slanderous charges made by husband or wife in the presence of the other spouse constituted an insufficient publication, because "the act of talking to one's wife differs but little from talking to one's self or thinking aloud."

Plaintiff contends, however, that the slanderous utterances were repeated in the presence of the police officers who came in response to Mr. Cohen's call. On this phase of the case plaintiff testified:

"When the police came, they did come into the apartment. They just come to my room and say, we are called here to throw you out this minute. Yes, they ask me to leave. They told me I should pack up and go with them. I asked them if anything wrong I did; if I do they should search me and tell me if I am a thief or anything like that. *** During this time my bag was in my room. *** It had been there all the time during that morning. They throw me out before I bring in my suitcase. They threw it out before and I bring my suitcase back to my room. *** I went out and picked up the bag then on the back porch and I bring the bag in my room and I pack my clothes. It was all upset and it came open. *** After the police came, they stayed there in the apartment maybe around twenty minutes. I finished packing my bag in that time and I told them I am ready to go. *** I just go with those policemen downstairs; they took me to the station. *** I don't know how long I was in the police station, two or two and one-half hours, I don't remember exactly."

In the additional abstract, which defendants say they were obliged to file, there appears the following:

"And Mr. Cohen go to the telephone and call the police, and the police came in five or ten minutes, and came to my room and told me, you got to pack your clothes and we are going to take you with us. I said, why do you want me take me with you? He said, because Mr. and Mrs. Cohen claim you stole linens, napkins and underwear."

26; Keller v. Howard, 12 III. App. 529; Yates v. Belcher, 172 Ill. App. 597.) Under plaintiff's own testimony the charges that she had stolen linens and other effects belonging to defendant were directed to plaintiff with no other person present in the room. According to plaintiff's testimony these charges were first made by Mrs. Cohen in one room, with the husband not present, and later repeated by Mr. Cohen in another room, with his wife not present, but even if they had been made by both defendants in the presence of each other, and in the presence of any other person, the statements would not constitute publication, because under the well established rule such a communication has been held an insufficient publication. In 17 Illinois Case Law 316, the author says that slanderous charges made by husband or wife in the presence of the other spouse constituted an insufficient publication, because "the act of talking to one's wife differs but little from talking to one's self or thinking aloud."

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In the additional abstract, which defendants say they were obliged to file, there appears the following:

"Mrs. Mr. Cohen go to the telephone and call the police, and the police came in five or ten minutes, and came to my room and said to me, you got to pack your clothes and we are going to take you with us. I said, why do you want me take me with you? Mr. Mrs. Cohen give you, not me. Cohen give you stole linens, napkins and many-many."

Upon the statement last quoted plaintiff bases her charge that the slanderous utterances were repeated in the presence of the police officers. However, she does not name or attempt to designate who the police officers were, and her statement can be nothing more than hearsay evidence and therefore incompetent. Moreover, it has been consistently held that a joint slander is not actionable, and plaintiff's statement, if it were competent, would constitute a joint slander. In Randall Dairy Co. v. Pevely Dairy Company, 274 Ill. App. 474, at p. 482, it was said that "two or more individuals uttering the same slanderous words at the same time cannot be sued in an action for slander, as joint tort-feasors, the reason being that the oral utterance of defamatory words by one is a complete offense, and the wrongful act is committed by the individual uttering the words, so that each speaks for himself and must respond in damages for his own language."

In Baker v. Young, 44 Ill. 42, the court affirmed the rule announced by Chitty that husband and wife "cannot be jointly sued for slander by both," and in Economy Light & Power Co. v. Hiller, 203 Ill. 518, the court said that "there are some wrongs, like slander, which cannot be joint, but the great majority of torts may be committed jointly."

It is argued by defendants that there is a fatal variance between the words complained of and those proved. The slander charged in the third amended complaint to Edith Cohen was as follows: "She [pointing at plaintiff] is a thief, she [pointing at plaintiff] stole linen belonging to us." Plaintiff testified that Mrs. Cohen said "You stole my linens, table cloth and napkins and my underwear," and the statement alleged to have been made by the police officer to plaintiff was "because Mr. and Mrs. Cohen claim you stole linens, napkins and underwear." There is a similar discrepancy with reference to the charges made by Mr. Cohen. The courts have generally held that words charged to have been spoken of a person are not proved by words spoken to a person. In Delatine v. Kramer, 235 Ill. App. 359, the appellant likewise contended that there was a variance between the allegations and proof. The court in its opinion

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It is argued by defendants that there is a fatal variance between the words complained of and those proved. The slander charged in the third amended complaint to Edith Cohen was as follows: "The [petitioner at plaintiff] is a thief, she [petition at plaintiff] stole linen belonging to us." Plaintiff testified that Mrs. Cohen said "You stole my linens, table cloth and napkins and my underwear," and the statement alleged to have been made by the police officer to plaintiff was "Because Mr. and Mrs. Cohen claim you stole linens, napkins and underwear." There is a similar discrepancy with reference to the charges made by Mr. Cohen. The courts have generally held that words charged to have been spoken of a person are not proved by words spoken to a person. In Dolittle v. Elmer, 43 Ill. App. 320, the appellant lawyer contended that there was a variance between the allegations and proof. The court in its opinion

called attention to the charges that the alleged slanderous words were spoken of appellee, whereas the proof showed that they had been spoken to her, and said: "The declaration charges the alleged slanderous words to have been spoken of appellee in the third person, whereas the uncontradicted evidence is to the effect that they were addressed directly to her, that is, in the second person. A variance of this character is fatal to a right of recovery," citing Sanford v. Gaddis, 15 Ill. 229; Wilborn v. Odell, 29 Ill. 456; Wallace v. Dixon, 82 Ill. 202; Becker v. Schiller, 49 Ill. App. 606; 25 Cyc. 486. In Sanford v. Gaddis, cited in the Kramer case, the court said (p. 230):

> "It is a well established rule in actions for slander that the allegations and proofs must agree. The plaintiff must prove the words alleged in the declaration or so much of them as will sustain his cause of action. It is not enough to prove other words of like import and meaning. Equivalent words or expressions will not suffice. *** And proof of words spoken to a person will not support a count for words spoken of a person."

The third amended count 2 was predicated upon an unlawful detention or false arrest; it was not laid for malicious prosecution and the court so held. The gist of the action was the unlawful detention. The evidence discloses that the Cohens ordered plaintiff out of their home, but she refused to leave. Defendants thereupon called the police, who came and took plaintiff from the Cohen home to the police station. No charges were preferred against her, no warrant issued and no complaint was signed. On cross-examination plaintiff admitted that she was not held a prisoner by defendants in their home, and she stated that there was no restraint placed upon her by defendants; she stayed in the apartment until the police came, because she wanted to collect some money clai ed due her from defendants. These admissions were elicited from her afte considerable cross-examination, but they are uncontradicted. Under the circumstances, there could be no illegal detention of plaintiff. Moreover, since plaintiff had alleged in her pleadings that she was forcibly ejected by defendants from their home, she could not well take the position that she had been illegally detained, because an illegal detention and a forcible ejection are utterly irreconcilable. The record is

called attention to the charges that the alleged slanderous words were spoken of appellee, whereas the proof showed that they had been spoken to her, and said: "The declaration charges the alleged slanderous words to have been spoken of appellee in the third person, whereas the uncontradicted evidence is to the effect that they were addressed directly to her, that is, in the second person. A variance of this character is fatal to a right of recovery," citing Sanford v. Gaddis, 15 Ill. 329; Williams v. Cobb, 39 Ill. 492; Dalton v. Dixon, 60 Ill. 204; Barber v. Bethlay, 49 Ill. 104; 15 Cyc. 454. In Sanford v. Gaddis, cited in the Kramer case, the court said (p. 329):

"It is a well established rule in actions for slander that the allegations and proofs must agree. The plaintiff must prove the words alleged in the declaration or so much of them as will maintain his cause of action. It is not enough to prove other words of like import and meaning. Equivalent words or expressions will not suffice, *** and proof of words spoken to a person will not support a count for words spoken of a person."

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clear that the police were called to remove her from the residence, and this is borne out by plaintiff's complaint and the evidence adduced upon the hearing. According to plaintiff's testimony the police, who arrived in response to Mr. Cohen's call, said "we are called here to throw you out this minute." This does not constitute an arrest of plaintiff on the direction or request of defendants, and in fact there is no evidence in the record to indicate that defendants, or either of them, ordered or demanded plaintiff's arrest. The only purpose in calling the police was to remove her from the family home as a discharged employee who insisted on remaining there because as she claimed there was money due her for unpaid wages.

Plaintiff states in her brief that the sole question presented on appeal is whether she made out a case by her evidence which entitled her to recover damages from defendants, and it is argued that the cause should have been submitted to the jury for a verdict. However, since there is no evidence of the publication of the slander charged nor of a detention of plaintiff by defendants, or that defendants or either of them ransacked her suitcase and took the $80, said by her to have been contained in the suitcase before it was thrown on the porch by Mr. Cohen, the jury could not fairly have returned a verdict in her favor. Therefore, having failed to make a prima facie case, the court properly directed a verdict in favor of defendants and entered judgment thereon. The judgment is affirmed.

The additional abstract filed by defendants was necessitated by plaintiff's failure to include all of the evidence and proceedings in her original abstract, and therefore the costs of the additional abstract are herewith taxed against plaintiff.

AFFIRMED AND COSTS OF ADDITIONAL ABSTRACT
NECESSARILY FILED BY DEFENDANTS TAXED
AGAINST PLAINTIFF.

Sullivan, P. J., and Scanlan, J., concur.

clear that the police were called to remove her from the premises, and this is borne out by plaintiff's complaint and the testimony adduced upon the hearing. According to plaintiff's testimony the police, who arrived in response to Mr. Cohen's call, said "we are called here to throw you out this minute." This does not constitute an assault of plaintiff on the direction or request of defendants, and in fact there is no evidence in the record to indicate that defendants, or either of them, ordered or demanded plaintiff's arrest. The only purpose in calling the police was to remove her from the premises, and a disinterested employee who intervened on remaining there because of the violent tones was merely due her for unpaid wages.

Plaintiff states in her brief that the sole question presented on appeal is whether she made out a case by her evidence which entitled her to recover damages from defendants, and it is argued that the issue should have been submitted to the jury for a verdict. However, there is no evidence of the publication of the slander charged nor of a detention of plaintiff by defendants, or that defendants or either of them remonstrated her actions and took the job, said by her to have been conducted in the manners before it was thrown on the porch by Mr. Cohen, the jury could not fairly have returned a verdict in her favor. Therefore, having failed to make a prima facie case, the court properly directed a verdict in favor of defendants and against plaintiff herein. The judgment is affirmed.

The additional abstract filed by defendants was necessitated by plaintiff's failure to include all of the evidence and proceedings in her original abstract, and therefore the costs of the additional abstract are properly taxed against plaintiff.

ATTORNEY AND COSTS OF ADDITIONAL ABSTRACT
NECESSARILY FILED BY DEFENDANTS TAXED
AGAINST PLAINTIFF.

Gallivan, P. J., and Sullivan, J., concur.

304 Ill. App.

40888

43A

HOWARD J. CURTIN,
Appellee,

v.

PAUL KINNEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 257

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant, Paul Kinney, appeals from a judgment entered in favor of Howard J. Curtin, plaintiff, upon a promissory note, which together with attorneys' fees and costs aggregated $300.82.

Judgment by confession was originally entered in favor of Curtin October 3, 1938. Thereafter, on motion of the defendant, Kinney, the judgment was set aside and Kinney was allowed to file his affidavit of defense, which averred in substance that March 3, 1937, Susi-Qui, Inc., an Illinois corporation, began to operate a night club at 6613 Cottage Grove avenue, Chicago; that it then purchased from Home Liquor Stores, Inc., merchandise in the aggregate amount of $296.05, on open account; that thereafter Home Liquor Stores refused to sell further merchandise on open account and required cash on each delivery, and in addition thereto insisted that Susi-Qui, Inc., pay $5 a week on the original open account of $296.05; that still later Home Liquor Stores required Susi-Qui., to execute and deliver to it a promissory note in the sum of $247.50, the balance then due after crediting the $5 weekly payments made on the oper account item; that following this transaction Susi-Qui, Inc., made payments on the note from September 11, 1937, to August 16, 1938, inclusive, aggregating $200, and finally, on September 10, 1938, delivered its cheek in the amount of $54.52 in full and final payment of said note, with an indorsement thereon, "in full payment of Lote to Home Liquor Co.," which indorsement was erased by Home Liquor Stores, through Peter Tutules, its president and duly authorized agent.

40222

HERBERT J. CURTIS,

Plaintiff,

v.

PAUL KIMMEY,

Appellant.

Appeal from Superior Court
of King County.

No. 304 1.A. 257

Defendant, Paul Kimmey, appeals from a judgment entered in favor of Howard J. Curtis, plaintiff, upon a promissory note, which together with attorney's fees and costs aggregated $[illegible].

Judgment by confession was originally entered in favor of Curtis October 3, 1928. Thereafter, on motion of the defendant, Kimmey, the judgment was set aside and Kimmey was allowed to file his affidavit of defense, which averred in substance that March 3, 1927, Post-and, Inc., an Illinois corporation, began to operate a night club at 601 College Ave., Seattle; that it then purchased from Home Liquor Stores, Inc., merchandise in the aggregate amount of $[illegible], on open account; that thereafter Home Liquor Stores refused to sell further merchandise on open account and required cash on each delivery, and in addition thereto initiated that Post-and, Inc., pay $5 a week on the original open account of $[illegible]; that still Home Liquor Stores required Post-and, Inc., to execute and deliver to it a promissory note in the sum of $447.50, the balance then due after crediting the $5 weekly payments made on the open account item; that following this transaction Post-and, Inc., made payments on the note from September 11, 1927, to August 1, 1928, inclusive, aggregating $200, and finally, on September 10, 1928, delivered its check in the amount of $[illegible] in full and final payment of said note, with an indorsement thereon, "in full payment of note to Home Liquor Co.," which indorsement was erased by Home Liquor Stores, through fraud, its president and duly authorized agent.

It is further averred that March 3, 1937, Home Liquor Stores, through its authorized agents, requested Susi-Qui, Inc., to execute its promissory note covering the open account then existing between the parties; that the note upon which judgment had been confessed was presented to Paul Kinney, president of Susi-Qui, Inc.; that the note shows on its face that it was intended as the note of Susi-Qui, Inc., but that the words "Susi-Qui, Inc.," had been erased by plaintiff or by some other person in his behalf; that the note described Paul Kinney as president, but that the word "president" had also been erased, leaving only the name of Paul Kinney remaining as the maker.

The affidavit of defense further avers that subsequently another note was submitted to Susi-Qui, Inc., covering the same transaction, and was given to Mr. Wesensten, the duly qualified president of the corporation; that Home Liquor Stores did not accept the note upon which judgment was confessed in payment of the open account, for the reason that Paul Kinney was not the president of Susi-Qui, Inc., but that nevertheless Home Liquor Stores, Peter Tutules and plaintiff herein, for the purpose of defrauding and cheating Kinney, retained the first note described in the affidavit of defense, which is the same note upon which judgment by confession was entered.

Defendant avers that he was at no time indebted to Home Liquor Stores, Peter Tutules or to plaintiff; that he never personally purchased any merchandise; that he never made or delivered the note upon which judgment was confessed as his personal obligation; that plaintiff is not the owner of the note and did not acquire it prior to maturity, nor pay value therefor; and that plaintiff had full knowledge of the matters and things thus averred prior to and at the time he acquired possession of the note. Lastly, it is averred that Susi-Qui, Inc., is not indebted on the note or otherwise to plaintiff, and that the note was paid in full.

The matter came on for hearing March 20, 1939. Plaintiff first called Peter Tutules, president of Home Liquor Stores, who testified in effect that Kinney, the defendant, signed a paper in the

It is further averred that March 3, 1937, Home Liquor Stores, through its authorized agents, repudiated Rust-Qui, Inc., by presenting its promissory note covering the open account then existing between the parties; that the note upon which judgment had been confessed was presented to Paul Kinney, president of Rust-Qui, Inc.; that the note shows on its face that it was intended as the note of Rust-Qui, Inc.; but that the words "Rust-Qui, Inc." had been erased by plaintiff or by some other person in his behalf; that the note described Paul Kinney as president, but that the word "president" had also been erased, leaving only the name of Paul Kinney remaining as the maker.

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Defendant avers that he was at no time indebted to Home Liquor Stores, Peter Tunles or to plaintiff; that he never personally purchased any merchandise; that he never made or delivered the note upon which judgment was entered as his personal obligation; that plaintiff is not the owner of the note and did not acquire it prior to maturity, nor pay value therefor; and that plaintiff had full knowledge of the matters and things then averred prior to and at the time he acquired possession of the note. Lastly, it is averred that Rust-Qui, Inc., is not indebted on the note or otherwise to plaintiff, and that the note was paid in full.

The matter came on for hearing March 26, 1938. Plaintiff first called Peter Tunles, president of Home Liquor Stores, who testified in effect that Kinney, the defendant, signed a paper in the

sum of $247.50, on or about February 23, 1937. The note was not introduced in evidence. After plaintiff rested, defendant's counsel asked for a finding against plaintiff and called the court's attention to the fact that the note had not been introduced, and that so far as the record was concerned it appeared to belong to Home Liquor Stores and not to plaintiff. The court, however, thought it was unnecessary for plaintiff to introduce the note in evidence, inasmuch as a judgment had previously been entered thereon by confession. From the oral evidence adduced upon the hearing it does not appear to whom the note was payable, nor the due date thereof. Tutules testified that Home Liquor Stores owned the note. Neither does the oral evidence disclose who the payee was, nor whether it was a negotiable instrument.

Under these circumstances defendant first contends that since he was allowed to plead upon the opening of the judgment by confession the burden is necessarily upon plaintiff to prove the case, the same as if defendant had been served by summons and no judgment had been confessed on the cognovit. This position is sustained by ample authority. (Borchsenius v. Canutson, 100 Ill. 82; Morris v. Taylor, 199 Ill. App. 588.) This being so, plaintiff was required to make a prima facie case by proving that the instrument was a negotiable instrument, the ownership of the note, the identity of the maker and payee, its due date, and such other facts as would constitute a case which defendant would be required to defend. This he failed to do. There is no allegation in the statement of claim that plaintiff was the assignee of the note, and since the note itself was not introduced in evidence and the testimony adduced upon the hearing failed to establish the necessary elements hereinbefore set forth, defendant's sworn answer denying the ownership of the note and the evidence adduced by defendant were sufficient to preclude a recovery. In Duquesne Security Co. v. Hodgens, 182 Ill. App. 88, the court held that the assignee of a judgment note cannot recover thereon in his own name in the Municipal court where the narr or statement of claim does not aver that the note was assigned. Moreover, the courts have held that whether an

sum of $247.50, on or about February 23, 1937. The note was not introduced in evidence. After plaintiff rested, defendant's counsel asked for a finding against plaintiff and called the court's attention to the fact that the note had not been introduced, and that so far as the record was concerned it appeared to belong to Home Liquor Stores and not to plaintiff. The court, however, thought it was unnecessary for plaintiff to introduce the note in evidence, inasmuch as a judgment had previously been entered thereon by confession. From the oral evidence adduced upon the hearing it does not appear to whom the note was payable, nor the due date thereof. Inasmuch as testified that Home Liquor Stores owned the note. Neither does the oral evidence disclose who the payee was, nor whether it was a negotiable instrument.

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instrument is negotiable or nost must be determined from the instrument itself, and such fact cannot be made to depend on extrinsic circumstances. (Economy Fuse Co. v. Standard Electric Company, 359 Ill. 504, 509.) The Negotiable Instruments Act (chap. 98, par. 21, sec. 1, Ill. Rev. Stats. 1939) sets forth the requirements as to form of a negotiable instrument, and unless the instrument is introduced in evidence it is impossible to determine whether it complies with the statute. The extrinsic facts to which Tutules testified do not supply these deficiencies. Therefore, since there is no evidence of record that the alleged note was a negotiable instrument, and since the only claim of assignment rests on the testimony of Peter Tutules, "that he indorsed the paper on the back of it," the court was not warranted in entering judgment for plaintiff.

These considerations have nothing to do with the additional claim of defendant, which is properly set forth in his affidavit of defense and sustained by competent evidence, that he paid $200 on account of the indebtedness in installments, and that on December 10, 1938, he delivered a check to Home Liquor Stores for $54.52, "in full payment of note to Home Liquor Co.," which was evidently a satisfaction of the debt. The photostatic copy of the note indicates that erasures were made on the indorsements, but the note was nevertheless put through the clearing house and the proceeds thereof retained by Home Liquor Stores. Since the latter took it subject to the indorsement, the acceptance of the money constituted an assent by which the creditor will be bound.

An additional record which was filed after the appeal was lodged in this court includes a photostatic copy of the note upon which judgment by confession was entered, and this copy clearly shows that the note was made by Susi-Qui, Inc., by Paul Kinney, president. The words, "Susi-Qui, Inc.," and "president" were erased by someone, leaving only the name of Paul Kinney as the maker. These circumstances fully bear out the contention of Kinney that he did not personally execute the note upon which judgment was confessed, and that he personally never

instrument is negotiable or not must be determined from the instrument itself, and such fact cannot be made to depend on extrinsic circumstances. (Bonocore Fruce Co. v. Standard Electric Company, 77 Ill. 504, 509.) The negotiable instruments act (Laws, 1897, pp. 71, sec. 1, Ill. Rev. Stats. 1939) sets forth the requirements as to form of a negotiable instrument, and unless the instrument is introduced in evidence it is impossible to determine whether it complies with the statute. The extrinsic facts to which Tuhlies testified do not supply these deficiencies. Therefore, since there is no evidence of record that the alleged note was a negotiable instrument, and since the only claim of assignment rests on the testimony of Peter Tuhlies, "that he indorsed the paper on the back of it," the court was not warranted in entering judgment for plaintiff.

These considerations have nothing to do with the additional claim of defendant, which is properly set forth in his affidavit of defense and sustained by competent evidence, that he paid $200 on account of the indebtedness in instalments, and that on December 10, 1938, he delivered a check to Home Liquor Stores for $54.52, "in full payment of note to Home Liquor Co.," which was evidently a satisfaction of the debt. The photostatic copy of the note indicates that erasures were made on the indorsements, but the note was nevertheless put through the clearing house and the proceeds thereof retained by Home Liquor Stores. Since the latter took it subject to the indorsement, the acceptance of the money constituted an assent by which the creditor will be bound.

An additional record which was filed after the appeal was lodged in this court includes a photostatic copy of the note upon which judgment by confession was entered, and this copy clearly shows that the note was made by Rust-Qui, Inc., by Paul Kinney, president. The words, "Rust-Qui, Inc.," and "president" were erased by someone, leaving only the name of Paul Kinney as the maker. There circumstances fully bear out the contention of Kinney that he did not personally execute the note upon which judgment was confessed, and that he personally never

assumed any obligation to the Home Liquor Stores or plaintiff.

Howard J. Curtin, the plaintiff, has not filed a brief in this court to sustain the judgment entered in his favor, and therefore we are unable to ascertain what his contentions may be. We are convinced, however, that the judgment was erroneously entered, and inasmuch as trial was had by the court without a jury it will be unnecessary to remand the cause. The judgment is accordingly reversed and judgment entered here against plaintiff and in favor of defendant for costs.

REVERSED AND JUDGMENT HERE FOR
DEFENDANT AND AGAINST PLAINTIFF
FOR COSTS.

Sullivan, P. J., and Scanlan, J., concur.

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Howard J. Gurian, the plaintiff, has not filed a brief in this court to sustain the judgment entered in his favor, and therefore we are unable to ascertain what his contentions may be. We are convinced, however, that the judgment was erroneously entered, and inasmuch as trial was had by the court without a jury it will be unnecessary to remand the cause. The judgment is accordingly reversed and judgment entered here against plaintiff and in favor of defendant for costs.

RAVENSCROFT AND DEMPSEY JUDGES
MCCORMICK AND ADAMS PRESIDING
JUDGES.

Sullivan, P. J., and Scanlan, J., concur.

304 Ill. App.

40932

ANNA STOLBERG,
Appellant,

v.

PAUL H. STOLBERG,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

304 I.A. 258

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her supplemental complaint for separate maintenance. The cause was heard by the court and resulted in the dismissal of the complaint for want of equity. Plaintiff appeals.

The parties were married in Chicago in 1923 and lived together as husband and wife until March, 1936. Two children were born of the marriage who were, at the time of the trial, 15 and 12 years of age. Both of them reside with their mother. Two previous complaints filed in either the Superior or Circuit court were previously dismissed. Mr. Stolberg has been voluntarily contributing $17.50 a week for the support of the children, out of an admitted income of $73.50 a week, and in addition thereto has paid for the childrens' clothes and some other incidental expenses. He has been employed by the Continental Baking Company in Chicago for some twenty years.

By concession the parties have not lived together since their separation in March, 1936. It is also undisputed that Mrs. Stolberg left her husband to live separate and apart from him, although the record is silent as to the reason for her leaving.

Mrs. Stolberg testified that she always conducted herself as a faithful, true and chaste wife. She alluded to a hearing before Judge David, but the particulars of that hearing are not set forth in the record. She testified that since that hearing

Appellee.

Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

304 I.A. 358

Mr. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her supplemental complaint against defendant. The cause was heard by the court and resulted in the dismissal of the complaint for want of equity. Plaintiff appeals.

The parties were married in Chicago in 1919 and lived together as husband and wife until March, 1936. Two children were born of the marriage who were, at the time of the trial, 17 and 12 years of age. Both of them reside with their mother. Two previous complaints filed in either the Superior or Circuit court were previously dismissed. Mr. Stolberg has been voluntarily contributing $17.50 a week for the support of the children, out of an admitted income of $73.50 a week, and in addition thereto has paid for the children's clothes and some other incidental expenses. He has been employed by the Continental Baking Company in Chicago for some twenty years.

By consecation the parties have not lived together since their separation in March, 1936. It is also undisputed that Mrs. Stolberg left her husband to live separate and apart from him, although the record is silent as to the reason for her leaving.

Mrs. Stolberg testified that she always conducted herself as a faithful, true and chaste wife. She alluded to a hearing before Judge David, but the particulars of that hearing are not set forth in the record. She testified that since that hearing

and about a year before the trial of the case at bar she called her husband and asked him if he "had any thoughts for me or the children for the future. He said all he was interested in was to take the children away from me and put them in a school and I could go to hell. I had no other conversation with him. This is the only time I ever talked to him because he said if I ever called again he would hang up on me; that he didn't want to speak to me at all."

Both children testified on behalf of their mother. Margaret, the older, said that she sees her father periodically in his apartment on the northwest side, and that she talked to him about going back to her mother; that he said "he would not have her back if she was the last woman on earth. He said the reason is she drinks, and everything." Margaret also testified that her father was kind to her, except when he drank he became abusive; also that when she broke her arm he took her to the doctor and when her teeth needed attention he took her to the dentist. Paul, the son, testified that he sees his father almost every week. He calls for him at his office on Friday evening and remains with him overnight and part of Saturday; that he had also talked to his father about returning to Mrs. Stolberg, but that his father said he would never go back to live with her, because he did not like her, and that "I do not remember that he gave any reason why he wouldn't live with my mother. My mother has been a good mother. She drinks a glass of beer once in a while, but not much."

Mr. Stolberg testified as to his residence and employment, and that he had been separated from his wife since March 6, 1936; that he always treated Mrs. Stolberg with consideration, and while they lived together furnished her with "the best of everything," but that she was never satisfied, drank quite a bit, and left him, taking all the furniture and furnishings except a couch. He told of the visits he had had with his children, that he had bought them practically everything, and that his contributions for their support and maintenance ran from $25 to $28 a week. In the course of the trial there was evidence,

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adduced by the two children, that Mr. Stolberg had threatened to kill his wife and her lawyer, but he vehemently denied these charges.

It appears from the record that about three weeks before the hearing Mrs. Stolberg called her husband on the telephone. She says that she then asked him to come back to live with her. The record discloses the following question propounded to defendant and his answer thereto pertaining to this contention: "Q. Did your wife ever, during the period of your absence, call you and ask you to take her back? A. Three weeks ago, on a Saturday, she called me up and spoke to me. It was the first time in a year and a half."

In answer to the supplemental complaint defendant averred that Mrs. Stolberg was living separate and apart from him through her own fault. He denied that he was pugnacious and belligerent, that he quarreled with her and threatened her, or that he used any violent language toward her or accused her of infidelity.

Two letters were introduced in evidence by defendant to sustain his contention that his wife was at fault, and to show the reasons why he had refused to return to her. One of these letters is dated August 4, 1937, and the other August 9, 1937. Both are addressed to one Sherman Reagan, who was then stationed at Camp Grant, Rockford, Illinois, with the 131st Infantry. The letters are rather lengthy and of an endearing nature. Mrs. Stolberg refers to several occasions on which she attended drinking parties and suggests that Mr. Reagan send her some money. We think it better for the sake of the children to refrain from quoting the contents of these letters at length, but it is easy to understand after reading them why defendant refused to return to plaintiff.

Plaintiff takes the position that since she is admittedly living separate and apart, her offer to return to him made in good faith and his refusal to accept her entitles her to separate maintenance. If the record disclosed that her offer was made in good faith there might be some force to her contention, but the tenor of her letters showing her relationship with Reagan refute her assertion

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Plaintiff takes the position that since she is admittedly living separate and apart, her offer to return to him made in good faith and his refusal to accept her entitles her to separate maintenance. If the record disclosed that her offer was made in good faith there might be some force to her contention, but the tenor of her letters showing her relationship with Reagan refutes her assertion

that the offer was made in good faith. In one of the letters she makes the suggestion that Reagan "trail" her husband, and adds that "you don't know what that would mean to me." In another she advises Reagan that she had just moved from one apartment to another in the same building, and that the new apartment was infested with cockroaches, and adds "of all things I despise, besides my husband and bed bugs, its cockroaches." These two exhibits and the fact that she had not communicated with her husband for more than a year, until she telephoned him shortly before the trial, cast serious doubt upon her good faith in asking him to take her back.

The law is well settled that in order to maintain a bill for separate maintenance under the statute (chap. 68, par. 22, sec. 1, Ill. Rev. Stats. 1939) it is necessary for the plaintiff to show not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. (Johnson v. Johnson, 125 Ill. 510.) Where a wife's conduct is such as to materially contribute to the disruption of the marital relation, she is not without fault within the meaning of the separate maintenance statute. (Cope v. Cope, 207 Ill. App. 617.) The cases relied on by plaintiff in support of her contention that Mr. Stolberg should have taken her back when she called him up shortly before the trial present circumstances clearly distinguishing them from the facts in the case at bar. In Pearsons v. Pearsons, 282 Ill. App. 92, the offer of the wife to return was made in good faith and the court held that "not only her evidence but his evidence shows that she made repeated, sincere efforts to live with him." In Haley v. Haley, 209 Ill. App. 153, the court pointed out that "it is clearly shown that within a few weeks after this separation, the wife made repeated offers to return to her husband and resume marital relations, which were refused by him." There is nothing in the circumstances disclosed by the record in this case indicating that Mrs. Stolberg's offer to return was made with any earnest desire to return to him, and in view of the circumstances here-

that the offer was made in good faith. In one of the letters she makes the suggestion that Reagan "trail" her husband, and adds that "you don't know what that would mean to me." In another she advises Reagan that she had just moved from one apartment to another in the same building, and that the new apartment was infested with cockroaches, and adds "of all things I despise, besides my husband and bed bugs, its cockroaches." These two exhibits and the fact that she had not communicated with her husband for more than a year, until she telephoned him shortly before the trial, cast serious doubt upon her good faith in asking him to take her back.

The law is well settled that in order to maintain a bill for separate maintenance under the statute (Comp. St. par. 32, sec. 1, Ill. Rev. Stats. 1939) it is necessary for the plaintiff to show not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. (Johnson v. Johnson, 182 Ill. 510.) Where a wife's conduct is such as to materially contribute to the disruption of the marital relations, she is not without fault within the meaning of the separate maintenance statute. (Cone v. Cone, 207 Ill. App. 617.) The cases relied on by plaintiff in support of her contention that Mr. Stolzberg should have taken her back when she called him up shortly before the trial present circumstances clearly distinguishing them from the facts in the case at bar. In Pearsons v. Pearsons, 282 Ill. App. 92, the offer of the wife to return was made in good faith and the court held that "not only her evidence but his evidence shows that she made repeated, sincere efforts to live with him." In Haley v. Haley, 209 Ill. App. 173, the court pointed out that "it is clearly shown that within a few weeks after this separation, the wife made repeated offers to return to her husband and resume marital relations, which were refused by him." There is nothing in the circumstances disclosed by the record in this case indicating that Mrs. Stolzberg's offer to return was made with any sincere desire to return to him, and in view of the circumstances here-

inpefore set forth, he was justified in refusing to take her back.

The burden of maintaining her bill was clearly upon plaintiff, and under the evidence presented the court was fully justified in holding that she had not established her right to separate maintenance by showing that she was living separate and apart from her husband without fault on her part. She proved that she left her husband and that she had been separated from him for more than two years, but failed to show that she was living separate and apart without fault on her part. Under the statute this is not sufficient.

For the reasons indicated the decree of the Circuit court dismissing the complaint for want of equity is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Therefore set forth, he was justified in refusing to take her back.

The burden of maintaining her bill was clearly upon plaintiff, and under the evidence presented the court was fully justified in holding that she had not established her right to separate maintenance by showing that she was living separate and apart from her husband without fault on her part. She proved that she left her husband and that she had been separated from him for more than two years, but failed to show that she was living separate and apart without fault on her part. Under the statute this is not sufficient.

For the reasons indicated the decree of the circuit court dismissing the complaint for want of equity is affirmed.

Affirmed.

Sullivan, P. J., and Scanlan, J., concur.

304 ILL. APP.

41074

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

ARTHUR L. WHITMER,
Appellant.

APPEAL FROM CRIMINAL COURT, COOK COUNTY.

304 I.A. 258

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Arthur L. Whitmer was tried in the Criminal court and found guilty under an indictment charging the crime of forgery, and he was sentenced to the Illinois State Penitentiary for the term of one to fourteen years. Thereafter he sued out a writ of error in the Supreme Court of Illinois, which was made a supersedeas, and was admitted to bail. The judgment of the Criminal court was subsequently affirmed in People v. Whitmer, 369 Ill. 317, and a petition for rehearing was thereafter denied. An appeal was prayed and allowed to the Supreme Court of the United States, and under a supersedeas, again issued, he was admitted to bail and has never commenced the service of sentence imposed upon him. His appeal was dismissed by the Supreme Court of the United States, and a petition for rehearing was denied. February 6, 1939, pursuant to notice served upon the State's Attorney of Cook County, Whitmer had leave to file his written motion in the Criminal court, supported by his sworn petition, to set aside the judgment theretofore entered, in lieu of a writ of error coram nobis. In response to a rule requiring the State to plead, answer or demur, the People filed a motion to dismiss. The cause was presented on the petition and motion to dismiss and the motion of Whitmer to strike the motion to dismiss. After these various motions were taken under advisement, further time was granted the State to comply with the original order to plead, answer or move to strike. The State then filed an answer.

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT:

Arthur L. Whitmer was tried in the Criminal court and found guilty under an indictment charging the crime of forgery, and he was sentenced to the Illinois State Penitentiary for the term of one to fourteen years. Thereafter he sued out a writ of error in the Supreme Court of Illinois, which was made a supersedeas, and was admitted to bail. The judgment of the Criminal court was subsequently affirmed in People v. Whitmer, 369 Ill. 317, and a petition for rehearing was thereafter denied. An appeal was prayed and allowed to the Supreme Court of the United States, and under a supersedeas, again issued, he was admitted to bail and has never commenced the service of sentence imposed upon him. His appeal was dismissed by the Supreme Court of the United States, and a petition for rehearing was denied. February 6, 1939, pursuant to notice served upon the State's Attorney of Cook County, Whitmer had leave to file his written motion in the Criminal court, supported by his sworn petition, to set aside the judgment theretofore entered, in lieu of a writ of error coram nobis. In response to a rule requiring the State to plead, answer or demur, the People filed a motion to dismiss. The cause was presented on the petition and motion to dismiss and the motion of Whitmer to strike the motion to dismiss. After these various motions were taken under advisement, further time was granted the State to comply with the original order to plead, answer or move to strike. The State then filed an answer.

Whitmer, through his counsel, moved to strike the answer of the People on the ground that it did not comply with the rule to plead, answer or demur. However, the court held the answer sufficient and denied the motion to strike. Whitmer thereupon moved for judgment, which motion was overruled, and the motion of the People for judgment on the pleadings was allowed. Whitmer appeals.

Inasmuch as the case was decided on the pleadings a brief summary of the lengthy petition filed by Whitmer is necessary to an understanding of the issues involved. He sets forth the filing of the indictment against him charging the crime of forgery, his plea of not guilty, the trial that ensued, resulting in the verdict of guilty and sentence, and sets forth various proceedings which followed, including the affirmance of the judgment by the Supreme court, the appeal to the Supreme Court of the United States, and the dismissal thereof.

The petition is based upon the statute which abolishes the writ of error coram nobis, and provides, among other things, that all errors in fact committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of final judgment in the case and upon reasonable notice. (Illinois Rev. Stat., chap. 110, sec. 72, par. 196.)

The errors alleged to have been committed in the proceedings before the trial judge, and which are said to have been unknown to the court, jury and petitioner, as well as to the state's attorney, are as follows: It is alleged that at the time of the trial and immediately preceding thereto his attorney, Lee D. Mathias, was sick anddisabled, and that notwithstanding an application for continuance because of the ill health of his attorney and his inability to prepare the case properly for trial, the case proceeded to hearing; that he was tried under an indictment charging him with having forged the name of Charles Wilkins to a collateral note in the amount of $5,000; that neither he nor his

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The errors alleged to have been committed in the proceedings before the trial judge, and which are said to have been unknown to the court, jury and petitioner, as well as to the state's attorney, are as follows: It is alleged that at the time of the trial and immediately preceding thereto his attorney, Leo D. Guthrie, was also addicted, and that notwithstanding an application for continuance because of the ill health of his attorney and his inability to prepare the case properly for trial, the case proceeded to hearing; that he was tried under an indictment charging him with having forged the name of Charles Gilkins to a collateral note in the amount of $5,000; that neither he nor his

his attorney were given notice by said indictment or otherwise that evidence of other offenses would be introduced, and that petitioner and his attorney were therefore totally unprepared and in ignorance of the real facts, which were also unknown to the court; that this lack of knowledge on his part, that of his attorney, and the court, was without negligence of petitioner, due to the ill health of his attorney, who was unable to inquire into the circumstances and properly prepare the case for trial. One of the other offenses to which the petitioner refers is the alleged forgery of a note bearing the signature of one Peterson. It is alleged that when the indictment charging perjury of the Peterson note came on for trial, other counsel represented petitioner in the criminal court, and resulted in a verdict of not guilty; that when the Peterson note was put in evidence on the first hearing, petitioner was totally unprepared to prove the facts, and as a result the court concluded from the circumstances that the Peterson note was either forged by defendant or done under his supervision. He alleges upon information and belief that upon a hearing he will be able to prove that one Herbert G. Kirby and one Bernice Downey Ellis, for the purpose of covering up shortages of which petitioner had no knowledge, and for which he was not responsible, substituted the so-called Peterson note for a genuine note, so that when Peterson appeared before the court on the first trial, wherein petitioner was convicted, and testified that the signature was not his, petitioner was not in position to dispute the testimony, and that if given an opportunity he would be able to produce facts that would explain the false Peterson note and exonerate him from any connection therewith; and it is alleged that if the testimony concerning the Peterson note had not been placed before the jury and the court in the trial wherein he was convicted, the judgment would not have been entered and that if the judge had known the facts as alleged in the petition, sentence would not have been imposed upon petitioner.

Appellant was convicted for forging the name of Charles

his attorney were given notice by said indictment or otherwise that evidence of other offenses would be introduced, and that petitioner and his attorney were therefore totally unprepared and in ignorance of the real facts, which were also unknown to the court; that this lack of knowledge on his part, that of his attorney, and the court, was without negligence of petitioner, due to the ill health of his attorney, who was unable to inquire into the circumstances and properly prepare the case for trial. One of the other offenses to which the petitioner refers is the alleged forgery of a note bearing the signature of one Peterson. It is alleged that when the indictment charging perjury of the Peterson note came on for trial, other counsel represented petitioner in the criminal court, and resulted in a verdict of not guilty; that when the Peterson note was put in evidence in the first hearing, petitioner was totally unprepared to prove the facts, and as a result the court convicted from the circumstances that the Peterson note was either forged by defendant or done under his supervision. He alleges upon information and belief that upon a hearing he will be able to prove that one Herbert G. Kirby and one Bernice Downey Ellis, for the purpose of covering up shortages of which petitioner had no knowledge, and for which he was not responsible, substituted the so-called Peterson note for a genuine note, so that when Peterson appeared before the court on the first trial, verdict against petitioner was convicted, and testified that the signature was not his, petitioner was not in position to dispute the testimony, and that if given an opportunity he would be able to produce facts that would explain the false Peterson note and exonerate him from any connection therewith; and it is alleged that if the testimony concerning the Peterson note had not been placed before the jury and the court in the trial wherein he was convicted, the judgment would not have been entered and that if the judge had known the facts as alleged in the petition, sentence would not have been imposed upon petitioner.

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Wilkins, and the Supreme court in People v. Whitmer, supra, concluded that the conviction and sentence were fully justified and supported by the record. Whitmer now takes the position, however, that although the Peterson note was a forgery it was forged by one of the witnesses in the case and that due to the illness of his counsel he was not able to present evidence which he contends would have exonerated him from any connection with the forgery of the Peterson note, and that the knowledge concerning the facts with reference to this testimony did not come to the attention of the petitioner, his attorneys, the court or the state's attorney, until after the entry of the judgment. There is nothing in the petition to indicate when Whitmer discovered that Ellis and Kirby had sworn falsely with respect to the Peterson note. For aught that appears in the petition it may have been discovered before the term at which Whitmer was tried and passed, so that it might have been presented to the lower court. The allegation that, if the Peterson note had not been placed before the jury the trial judge would not have entered the judgment, is not supported by the allegation of any facts which would lead to that conclusion.

The gravamen of the complaint is that the court should not have disposed of the petition without having granted a hearing, and that the refusal of the court to strike the answer of the People on the ground that it did not comply with the rule to plead, answer or demur, in holding the People's answer sufficient, and in overruling the motion of petitioner for judgment, constituted error. A motion to vacate a judgment under the Practice act is governed by the same rules of practice as prevailed at common law under the writ of error coram nobis, and the errors which may be corrected by the court upon motions of that character are such errors of fact as could have been corrected by the writ of error coram nobis. These errors of fact are not such questions as arise upon pleadings in the case, or as constitute the basis of a cause of action or defense, but are such errors as relate to the disability of the parties, the incapacity of the

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plaintiff to sue or the disability of defendants to defend, which if known to the court, would have prevented the entry of the judgment. (Marabia v. Thompson Hospital, 309 Ill. 147; Jacobson v. Ashkinaze, 337 Ill. 141, 146.) It has also been held that the writ of error coram nobis does not lie to correct false testimony, nor to determine a question of fact which has been adjudicated where there was perjury at the trial. (People v. Drysch, 311 Ill. 342, 349.) In the latter decision the court in discussing the function of the writ of error coram nobis, said: "The writ does not lie to determine a question of fact which has been adjudicated, even though decided wrongly, (Beard v. State, 81 Ark. 515; Hamlin v. State, 67 Kansas 724; State v. Armstrong, 41 Wash. 601; State v. Stanley, 225 Mo. 525;) nor for alleged false testimony at the trial, (Asbell v. State, 62 Kan. 209; Wilson v. State, 46 Wash. 416;) nor for newly discovered evidence. (Asbell v. State, supra.)"

The contention that petitioner should have had a hearing because he filed a petition which is in the nature of a declaration is untenable, because his petition alleges nothing which would entitle him to the relief sought. (People v. Nakielny, 279 Ill. App. 387.) The state challenged his petition by a detailed pleading, which set forth the affirmance of the judgment in People v. Whitmer, and the subsequent proceedings in the Supreme court of the United States; it averred that Whitmer was estopped from claiming a review under the statute by reason of the affirmance of the conviction by the Supreme court of this state, and the denial of a rehearing; that the facts set forth were mere conclusions, and were insufficient to vest the criminal court with jurisdiction; that perjury alone is not sufficient ground for issuance of a writ under the statute; that the alleged newly discovered evidence was not ground for relief; and that the petition failed to aver what the testimony of the new witnesses would be, nor that their testimony would tend to prove that petitioner was not guilty of the charge upon which he was convicted. The state's answer also averred that Whitmer was not prevented from

plaintiff to use or the disability of defendants to defend, which if known to the court, would have prevented the entry of the judgment. (Merchie v. Thompson Hospital, 309 Ill. 147; Jackson v. Lindgren, 337 Ill. 141, 146.) It has also been held that the writ of error coram nobis does not lie to correct false testimony, nor to determine a question of fact which has been adjudicated where there was perjury at the trial. (People v. Brown, 311 Ill. 342, 349.) In the latter decision the court in discussing the function of the writ of error coram nobis, said: "The writ does not lie to determine a question of fact which has been adjudicated, even though decided wrongly." (Board v. State, 81 Ark. 517; Bailey v. State, 67 Kansas 744; State v. Gardner, 41 Wash. 881; Ellis v. Hamlin, 225 Mo. 525;) nor for alleged false testimony at the trial. (Ewalt v. State, 47 Ind. 209; Wilson v. State, 46 Ind. 416;) nor for newly discovered evidence. (Ewalt v. State, supra.)"

The contention that petitioner should have had a hearing because he filed a petition which is in the nature of a declaration is untenable, because his petition alleges nothing which would entitle him to the relief sought. (People v. Maitlany, 279 Ill. App. 387.) The state challenged his petition by a detailed pleading, which set forth the affirmance of the judgment in People v. Whitmer, and the subsequent proceedings in the Supreme court of the United States; it averred that Whitmer was estopped from claiming a review under the statute by reason of the affirmance of the conviction by the Supreme court of this state, and the denial of a rehearing; that the facts set forth were mere conclusions, and were insufficient to vest the criminal court with jurisdiction; that perjury alone is not sufficient ground for issuance of a writ under the statute; that the alleged newly discovered evidence was not ground for relief; and that the petition failed to aver what the testimony of the new witnesses would be, nor that their testimony would tend to prove that petitioner was not guilty of the charge upon which he was convicted. The state's answer also averred that Whitmer was not prevented from

presenting the alleged facts to the court at the time of the trial, either by duress, fraud or excusable mistake or ignorance; that the original Peterson note was impounded for comparison with standards of writing, and with the signature on the note, and that Bernice Downey Ellis testified in the case and that her handwriting was in evidence on exhibits introduced by the state, and that these matters had been adjudicated by the Supreme Court of Illinois and the judgment affirmed.

We think that under the answer filed by the state the court was fully justified in dismissing the petition, because it pointed out in detail the deficiencies of the petition and the various ground upon which the court lacked jurisdiction to set aside the judgment of conviction theretofore entered. The state's answer was an effectual compliance with the rule to plead, answer or demur. The pleading filed challenged the sufficiency of the petition and enabled the court to determine whether petitioner was entitled to a hearing. The dismissal of the petition was the ruling by the court that the petition was insufficient. We see no reason why the judgment of the Criminal court should be reversed and it is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

proceeding the alleged facts to the court at the time of the trial, either by waiver, fraud or excusable mistake or ignorance that the original Peterson note was incorporated for computation with attorney's of writing, and with the signature on the note, and that Dorothy Perry Ellis testified in the case and that her testimony was in evidence on exhibits introduced by the state, and that these matters had been adjudicated by the Supreme Court of Illinois and the judgment affirmed.

We think that under the waiver filed by the state the court was fully justified in dismissing the petition, because it pointed out in detail the deficiencies of the petition and the various grounds upon which the court lacked jurisdiction to set aside the judgment of conviction complained of. The state's answer was an affirmative compliance with the rule to plead, answer or demur. The pleading filed challenged the sufficiency of the petition and enabled the court to determine whether petitioner was entitled to a hearing. The dismissal of the petition was the ruling by the court that the petition was insufficient. We see no reason why the judgment of the Criminal court should be reversed and it is therefore affirmed.

JUDGMENT AFFIRMED.

Mulkey, P. J., and Kiesling, J., concur.

304 Ill. App

40293

A. ANDERSON et al.,
(Plaintiffs)
Appellees and Cross-appellants,

v.

THE SANITARY DISTRICT OF CHICAGO,
a municipal corporation,
(Defendant)
Appellant and Cross-appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

304 I.A. 259

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action filed October 14, 1936, on behalf of 234 employees or former employees of The Sanitary District of Chicago, a municipal corporation, to recover amounts which they allege were deducted from the wages they were entitled to during 1932. On December 31, 1936, 125 additional employees or former employees were also made parties plaintiff. After the opening statements of counsel had been made to the jury called to try the cause, plaintiffs, without introducing any evidence, rested their case upon the pleadings. Thereupon defendant presented its motion and an instruction in due form to direct a verdict for it, and the court withheld a ruling thereon. Defendant then rested its case without presenting any evidence and again moved for a directed verdict in its behalf. Plaintiffs then moved for a directed verdict for the full amounts alleged to have been deducted from each of plaintiffs' wages for the entire year 1932, aggregating $161,771.62, which motion was denied. Plaintiffs also filed a motion for a directed verdict for the amounts alleged to have been deducted from the wages of all plaintiffs from January 1, 1932, to January 28, 1932, aggregating $18,619.14, which motion was denied. Plaintiffs also moved for a directed verdict for the amounts alleged to have been deducted from the wages of 38 of the plaintiffs during the period from March 14, 1932, to June 15, 1932, aggregating $13,303.79. The trial court refused defendant's instruction for a directed verdict and gave

to the jury an instruction in accordance with plaintiffs' last mentioned motion. Thereupon a verdict was returned finding the issues for 297 plaintiffs and fixing the amount due each. The aggregate amount awarded by the verdict was $13,243.20. Defendant appealed from a judgment entered upon the verdict.

Plaintiffs have assigned cross-errors in which they complain: "1. The court erred in refusing the first peremptory instruction requested by plaintiffs at the close of all the evidence in said cause. 2. The court erred in overruling the plaintiffs' first motion for judgment notwithstanding the verdict in said cause." Plaintiffs assign no error as to the action of the court in denying their motion for a directed verdict for $18,619.14.

A number of suits instituted by municipal employees, seeking to recover reductions made in their salaries or wages during the period of the depression, have been before the courts. This is the third one that has reached this court. See People ex rel. Sulvey v. City of Chicago et al., 292 Ill. App. 509 (petition for leave to appeal denied by the Supreme court, ib. xvii), and People ex rel. v. Chicago Park District, 296 Ill. App. 365 (petition for leave to appeal denied by the Supreme court, ib. xxxii). The Sulvey case involved many employees of the City of Chicago. The Chicago Park District case involved many employees of the Chicago Park District as successor to the South Park Commissioners. The instant suit involves $160,771.62, but defendant's statement that if plaintiffs' position is sustained it would involve an obligation of the Sanitary District for all employees for the years 1932 to 1937 in the sum of two and one-half to three million dollars, is not contradicted. On July 1, 1937, the Sanitary District restored all wages to the amounts paid prior to 1932. Plaintiffs in the instant case were not civil service employees at the time in question, as the statute placing the employees of the Sanitary District under civil service was not enacted until 1935. Employees, in 1932, were appointed and held their positions at the will of the Board of Trustees.

to the jury on instructions in conformance with plaintiff's last contention as matter. Therefore a verdict was directed finding the issues for the plaintiffs and fixing the amount due each. The aggregate amount fixed by the verdict was $[illegible]. Defendants appealed from a judgment entered upon the verdict.

Plaintiffs have assigned errors in which they contend:

"1. The court erred in refusing the first peremptory instruction requested by plaintiffs at the close of all the evidence in both cases.

2. The court erred in overruling the plaintiffs' first motion for judgment notwithstanding the verdict in each case." Plaintiffs assign no error as to the action of the court in fixing their motions for a directed verdict for $[illegible].

A number of suits instituted by municipal employees, seeking to recover salaries made in their salaries or wages during the period of the depression, have been before the courts. This is the third one that has reached this court. See Jungle ex rel. Smith v. City of Chicago et al., 370 Ill. [illegible]. The plaintiffs in the case in question brought by the Supreme Court, in, well, one Jungle ex rel. v. Chicago [illegible] Ill. [illegible]. Jay (petition for leave to appeal denied by the Supreme Court, in, well). The [illegible] case involved many employees of the City of Chicago. The [illegible] case involved many employees of the Chicago Park District as successor to the South Park Commissioners. The instant suit involves $[illegible], but defendants's contention that if plaintiffs' position is sustained it would involve an obligation of the Sanitary District for all employees for the years 1931 to 1937 in the sum of two and one-half to three million dollars, is not constitutional. On July 1, 1937, the Sanitary District restored all wages to the amounts paid prior to 1931. Plaintiff's in the instant case were not still working employees at the time in question, so the statute placing the employees of the Sanitary District under civil service was not enacted until 1937. Employees, in 1934, were organized and held their positions at the will of the Board of Trustees.

As the cause was determined by the trial court upon the pleadings, it is necessary for us to state the pleadings at some length:

A. Anderson and 233 other plaintiffs filed the verified complaint October 14, 1936. Count 1 of the complaint alleges:

"1. During the year 1932 the plaintiffs were employed by the defendant at the respective salaries designated in the appropriation ordinance of said defendant hereinafter mentioned * * *.

"2. On January 28, 1932, the defendant duly passed, adopted and enacted an appropriation ordinance for the year beginning January 1, 1932, and ending December 31, 1932 * * *. [Here follows the ordinance, the pertinent parts of which are referred to in the opinion.]

"3. At a regular meeting of the Board of Trustees of the defendant on June 16, 1932, the following proceedings were had and taken:

"'Mr. Woodhull presented the following report from the Committee on Finance:

"'Chicago, June 16, 1932.

"'To the Honorable, the President and Board of Trustees of
The Sanitary District of Chicago.

"'Gentlemen:

"'Your Committee on Finance reports that it has had under consideration the question of determining a reduction in the union scale of wages paid to members of the various trade unions employed by the Sanitary District, and after numerous conferences with the representatives of said unions and after due consideration given the subject-matter, it has finally reached an agreement which is satisfactory to all concerned, and attaches herewith a schedule setting forth in detail the various trades, the old scale of wages and the new scale of wages agreed upon which is to take effect as and from March 16, 1932, which will result in a substantial saving in the cost of the work done by the Sanitary District, and recommends that the new scale of wages be adopted and the passage of the following order:

"'Ordered, That the new scale of wages set forth in the schedule hereto attached affecting the members of the various trades employed by the Sanitary District, be and the same is hereby adopted, the same to take effect as and from March 16, 1932.

"'Respectfully submitted,

"'B. A. WOODHULL,
Chairman, Committee on Finance.

"'Approved as to Form and Legality:
"'CHARLES W. ANTHONY,
Principal Assistant Attorney.

"'REDUCED UNION SCALES EFFECTIVE MARCH 15, 1932, AS APPROVED BY BOARD OF TRUSTEES OF THE SANITARY DISTRICT AT MEETING JUNE 16, 1932.

* * * [Here follows a schedule of trades, the old and new monthly wage scales for each, and the number of days that constituted a week for each trade.]

"'Any other trades employed by the Sanitary District from time to time to be reduced in similar proportion. Also should any trades now working on less than regular time return to full time working schedules, rate to be adjusted in proportion with above reduction.

"'Mr. Woodhull moved that the report be adopted and the accompanying order passed.

"'On roll call the motion was carried by the following vote:

"'Yeas. - Messrs. Bowler, Byrne, Colianni, Moran, Tomhy, Thelen and Woodhull - Seven.

"'Nays - None.'

of which proceedings in this paragraph stated the plaintiffs had no notice or knowledge during the year 1932.

"4. The said proceedings set forth in paragraph 3 of this count are and were wholly unconstitutional, null and void, so far as the plaintiffs are concerned, and in conflict with various sections, articles, provisions and amendments of the Constitutions of the United States of America and the State of Illinois, for the following, among other, reasons: * * *

"4. [5] Although the plaintiff A. Anderson was so employed as a Cable Splicer at a salary of $295.00 per month as designated in the appropriation ordinance of said Defendant hereinbefore mentioned, during the entire year 1932, and faithfully and diligently performed all the duties of his said employment during the entire year 1932, yet the defendant paid to him on account of his salary for the year 1932 only $265.50 per month for the period of time from January 1, 1932, to March 15, 1932, and only $236.00 per month for the remainder of the said year 1932, leaving still due and unpaid from the defendant to the plaintiff, as the balance of plaintiff's said salary for the said year 1932, $301.25, for which sum of money the plaintiff A. Anderson asks judgment against the defendant."

Counts 2 to 219, inclusive, reallege paragraphs 1 to 4 of count 1, and the 5th paragraph of each of said counts is the same as paragraph "4. [5]" of count 1 except as to the names of the plaintiffs, occupations and the amounts sued for.

Counts 220 to 234, inclusive, are the same as the preceding counts except as to the names of the plaintiffs, occupations and the amounts sued for and claim recovery for only the ten per cent reduction for the entire year.

Defendant's verified answer to plaintiffs' complaint is as follows:

"(a) The defendant admits, as alleged in paragraph 1 of

* * * [Here follows a statement of facts, the gist of which has been partly stated (for brevity, see the number of lines this constitutes a trade for such trade.)]

"Many other trades employed by the industry directly from time to time to be present in similar proportion. This should any trades now working on late shift regularly, then average to fill that working schedule, rule to be adjusted by proportion well-known relatives.

"Sir, Goodwill moved that the report be adopted and the recommendations under passed.

"He said that the motion was seconded by the following vote:

"Ayes - Ernster, Dooley, Lyons, Williams, Brown, Cherry, Wales and Goodwill - 7votes.

"Noes - None.

of which proceedings in this particular relate the plaintiffs and so matter as knowledge during the year 1917.

"6. The said proceedings set forth in paragraph 3 of this answer are not were wholly merely fictitious, null and void, so far as the plaintiffs are concerned, and be whether with without notice, artificial, prejudicial and considerate of the interests of the trades of labors of labors and the trade of tailors, for the following, some other, reasons: * * *

"6. (f) Although the plaintiff s. tailoress was be employed as a trade tailor at a salary of $15.00 per month in accordance the agreements entered of with individual individuals, during the months year 1917, and faithfully and diligently performed all the duties of her said employment during the months year 1917, yet the defendant paid to her on account of her salary for the year 1917 only $12.00 per month for the period of time from January 1, 1917, to June 30, 1917, and only $10.00 per month for the remainder of the year 1917. Leading 1917 the sum equals from the difference in the plaintiff, or the balance of plaintiff, was salary for the said year 1917, for which the defendant refused to pay the plaintiff, when called upon the defendant."

Counts 2 to 23, inclusive, pleading paragraphs 2 to 4 of answer 1, and the 23d paragraph of each of said counts is the same as paragraph 6. (f) of count 2 except as to the name of the plaintiff, employing and the counsel and fee.

Counts 24 to 234, inclusive, are the same as the preceding counts except as to the name of the plaintiff, occupation and the amounts sued for and claim recovery for only the two per cent assessment for the entire year.

"Defendant's verified answer to plaintiffs' complaint is as follows:

"(a) The defendant admits, as alleged in paragraph 2 of

Count 1 of the complaint, that plaintiffs were employed by it during the year 1932, and admits that during all such time, and at present the defendant was and is a municipal corporation duly organized under the laws of the State of Illinois, but this defendant denies that the plaintiffs were employed at the salary they infer or conclude is designated in the appropriation ordinance of this defendant for the year 1932.

"(b) The defendant admits, as alleged in paragraph 2 of Count 1 of the complaint, that the Board of Trustees of The Sanitary District of Chicago on January 28, 1932, duly adopted the Annual Appropriation Ordinance for the fiscal year beginning January 1, 1932, and ending December 31, 1932, the material portions of which Ordinance are as set out in the complaint, excepting Section 8, thereof, which is as follows:

"'Section 8. That the appropriation herein of the amounts for the payment of "unpaid bills" or "contractual liabilities," or to defray the expense of any project or purpose, shall not be construed as an approval or an admission of liability by the Board of Trustees of any of said bills or contractual liabilities, or of any project or purpose mentioned herein; but shall be regarded only as the provision of a fund or funds, for the payment thereof when said bills or contractual liabilities have been found to be valid and legal obligations against The Sanitary District of Chicago and when properly vouchered, audited and approved by the Board of Trustees, or when any project or purpose is approved and authorized by the Board of Trustees of The Sanitary District of Chicago, as the case may be.'

"(c) The defendant admits, as alleged in paragraph 3 of Count 1 of the Complaint, that the Board of Trustees of the defendant at a regular meeting on June 16, 1932, after conferences with and approval by the Union representatives acting for and on behalf of the plaintiffs, adopted an approved schedule of wages, effective as and from March 16, 1932, but the defendant denies that plaintiffs had no notice or knowledge of said action during the year 1932.

"(d) This defendant denies, as alleged in paragraph 4 of Count 1 of the Complaint, that the actions taken by the Board of Trustees of the defendant as recited in paragraph 3 of Count 1 of the Complaint, are and were unconstitutional, and denies that they were null and void, and denies that they conflicted with the various sections, articles, provisions and amendments of the Constitutions of the United States and the State of Illinois * * *.

"(e) The defendant denies, as alleged in paragraph 4 of Count 1 of the Complaint, that the plaintiff A. Anderson was employed as a Cable Splicer at a salary of $295.00 per month and denies that said amount was so designated in the appropriation ordinance of this defendant, for the year 1932, this defendant admits that said plaintiff performed the duties of his employment as a Cable Splicer during 1932 and admits that it paid to said plaintiff in full for said services the sum of $265.50 per month from January 1, 1932 to March 15, 1932, and $250.00 in full per month from March 16, 1932 to December 30, 1932, but defendant denies that there is a balance due and unpaid to the plaintiff for the year 1932, the sum of $501.25 or any other sum, as all sums due to said plaintiff for services rendered have been paid in full by this defendant.

"(f) This defendant, as to Counts 2 to 234 inclusive of the Complaint, for answer thereto adopts and herein incorporates by reference sub-paragraphs (a), (b), (c), (d) and (e) of Paragraph 1 hereinabove set forth in this Answer, but defendant denies, as alleged

in Paragraph 3 of Counts 2 to 234 inclusive of the Complaint, that the plaintiffs therein named were employed in the capacity mentioned at the salary designated in said counts and denies that said amount was so designated in the appropriation ordinance of this defendant for the year 1932, this defendant admits the plaintiffs named in Counts 2 to 234 inclusive performed the duties of their positions during 1932 and admits that it paid to said plaintiffs in full for said services the amounts admitted in said counts to have been received by the plaintiffs for the periods designated during 1932, but this defendant denies that there is a balance due and unpaid to any of said plaintiffs in the amount designated in Counts 2 to 234 inclusive or in any other amount, as all sums due to said plaintiffs for their services have been paid in full by this defendant.

"II.

"1. And for a defense to this action, defendant alleges, that the plaintiffs are and were in 1932 and prior thereto, members of various Union Organizations and that it was customary and in accordance with precedent, the Constitution, Rules and By-Laws of said Union Organizations, for negotiations of working conditions and wages to be discussed with and agreed to by the Official Representatives of said Unions on behalf of their members employed by the Sanitary District, and that all of said plaintiffs, prior to 1932 and at all times thereafter, as members of said Unions, subscribed to said precedents, Constitution, Rules and By-Laws, and authorized and delegated said Union Representatives to appear in their behalf and to negotiate and agree in their name and in their behalf as to working conditions and the wages to be paid to said employees by this defendant.

"2. This defendant alleges that in the fall of 1931, it in common with all other municipal bodies, was facing desperate and chaotic conditions with respect to its municipal finances. Employees were not being promptly paid because taxes were not being collected due among other things to the depression, tax strikes, etc., and it was apparent to all, including the plaintiffs, that the expenses of the Sanitary District would have to be drastically reduced in 1932 if the Sanitary District was to continue to function and that a wholesale discharge of employees including the plaintiffs was inevitable or, in lieu thereof, in order to avoid a discharge of the plaintiffs, that the salaries of all employees including the plaintiffs, must be reduced. While the 1932 budget was being considered and prior to its adoption, the Official Union Representatives after conferences with and the knowledge, approval and sanction of their members, including the plaintiffs, who were employees of the Sanitary District, agreed with the Board of Trustees that the wages of all members of their Unions employed by the Sanitary District should be reduced 10% from the wages paid during 1931 and prior years. The aforesaid agreement for the reduction of 10% was made with the full knowledge of, and authorized and approved by all of the plaintiffs as members of their respective Unions and said plaintiffs received, accepted and were paid during 1932 their said salaries on the basis of the aforesaid reduction in full payment for all services rendered.

"3. This defendant alleges that because its financial condition in the first three months of 1932 instead of improving, became more desperate and conditions in the industries in which the plaintiffs herein were employed required a reduction in the wage scale of their respective crafts if their employment was to continue, conferences were had between the employers in the metropolitan area of Chicago and the Official Union Representatives with a view of agreeing upon a reduced wage scale. Starting in March, 1932, similar conferences were held between this defendant and the Official Union Representatives, appearing with the full knowledge of, at the request of and on behalf of the plaintiffs who were members of their respective Unions, which conferences terminated in June, 1932, at which time a reduced wage scale

desperate

effective as of March 16, 1932, equivalent to the then prevalent scale for members of their crafts was approved by the plaintiffs as members of their respective Unions and approved by the Official Union Representatives in their behalf and approved by the Sanitary District and that from March 16, 1932 to December 31, 1932, the plaintiffs received, accepted and were paid the revised scale in full payment of their services during said period.

"III.

"1. And for a further and separate defense defendant alleges, that the plaintiffs in 1932 were not Civil Service Employees of the Sanitary District but held their appointment at the will of its Board of Trustees who were the corporate authorities of this defendant. That said Board of Trustees in 1932 were by Statute given plenary powers in matters pertaining to the appointing of its officers and employees and in the adjustment of their compensation. That the Sanitary District Act specifically provided as follows:

"'The trustees elected in pursuance of the foregoing provisions of this act shall constitute a board of trustees for the District by which they are elected, which board of trustees is hereby declared to be the corporate authorities of such District, and shall exercise all the powers and manage and control all the affairs and property of such District. * * * Said board may prescribe the duties and fix the compensation of all the officers and employees of said Sanitary District, * * *. Said board of trustees shall have full power to pass all necessary ordinances, orders, rules, resolutions and regulations for the proper management and conduct of the business of said board of Trustees and of said corporation and for carrying into effect the object for which such sanitary district is formed * * *.'

"Chap. 42, par. 340, p. 1171, Ill. Rev. Stat. (1935 Ill. Bar Assn.) Sanitary District Act of 1889.

"2. Defendant alleges that starting in 1931 the financial affairs of the Sanitary District started to reach a desperate stage as it was unable to meet its obligations due to lack of finances. Its payrolls were not being met, there was no market for its securities as its bonds were in default, construction work had ceased because of lack of funds, the collection of taxes was delayed because of a reassessment ordered by the State Tax Commission and taxes were not being paid because of the depression and a 'tax strike'. To meet these conditions it was imperative that the Board of Trustees drastically reduce all expenses if the Sanitary District was to continue to function and to discharge a great many employees, including the plaintiffs, or, for the benefit of the plaintiffs and to avoid their discharge, to reduce their salaries and to retain them in employment. These circumstances were known to the plaintiffs and they authorized their Union Representatives to negotiate with this defendant. Who agreed with the defendant that a 10% reduction, from the salaries paid them the previous year, would be effective in 1932. The Board of Trustees on January 14, 1932 (Page 4 of the Official Proceedings for 1932) thereupon adopted the following Order, which was known to and approved by these plaintiffs: * * * [Here follows the Order adopted by the Board of Trustees on January 14, 1932, hereafter referred to in the opinion.]

"3. Defendant alleges, pursuant to said Order and in accordance with the Agreements made with the Official Union Representatives, with the knowledge and approval of the plaintiffs, and in their behalf the Board of Trustees adopted the Annual Appropriation Ordinance for the year 1932 as set out in plaintiffs complaint and therein appropri-

ated and levied funds equal to only 90% of the previous years salary for each position designated in the Ordinance, said sums to be paid only upon approval by the Board of Trustees and pursuant to the provisions of said Ordinance, which in part specifically provided:

"'Sec. 5. * * *; and that in the monthly compensation appearing in the personal service appropriations the word month shall be construed to mean a full calendar month and that for Sundays, holidays or time off permitted under the working schedules a deduction of ten per cent shall be made monthly from said monthly compensation.'

and subject further to provisions of Section 8 of said Ordinance which provided:

"'Section 4. That the appropriation herein of the amounts for the payment of "unpaid bills" or "Contractual liabilities," or to defray the expense of any project or purpose, shall not be construed as an approval or an admission of liability by the Board of Trustees of any of said bills or contractual liabilities, or of any project or purpose mentioned herein; but shall be regarded only as the provision of a fund or funds, for the payment thereof when said bills or contractual liabilities have been found to be valid and legal obligations against The Sanitary District of Chicago and when properly vouchered, audited and approved by the Board of Trustees, or when any project or purpose is approved and authorized by the Board of Trustees of the Sanitary District of Chicago, as the case may be.'

"4. Defendant alleges that all of the plaintiffs named in Counts 220 to 234, inclusive of the Complaint were paid on the basis of the said Appropriation Ordinance for the entire year 1932 and received and accepted without objection or protest said sums in full payment of all services rendered by them for said period; and that plaintiff A. Andersen and all plaintiffs named in Counts 2 to 219 inclusive of the Complaint were paid on the basis of said Appropriation Ordinance from January 1, 1932 to March 15, 1932, and received and accepted without objection or protest said sums in full payment of all services rendered by them for said period.

"5. Defendant alleges that due to the continued financial stringency of its affairs, and to prevent a discharge of plaintiff A. Andersen and of many of the plaintiffs named in Counts 2 to 219, inclusive, with the knowledge, approval and authorization of the plaintiffs as members of their respective Unions, negotiations were had between the Union Representatives and the Sanitary District starting in March, 1932 for a further reduction in the wages of the plaintiffs with the distinct understanding that when the conferences were completed and a revised wage scale finally agreed upon it would become effective as of March 16, 1932. That a revised wage scale corresponding to the wage scale prevalent in the metropolitan area, was agreed upon between the Union Representatives and the Sanitary District in June 16, 1932, which was made with the full knowledge, consent and approval of the plaintiffs, and that the Board of Trustees in accordance with the powers vested in them by Statute and in accordance with Section 5 of the Appropriation Ordinance for 1932, adopted, approved and authorized payment of said salaries on the revised scale by an Order of the Board of Trustees at a regular meeting held on June 16, 1932 (pages 538-539 of the Proceedings for 1932), said wages to be paid starting from March 16, 1932. That plaintiff A. Andersen and all plaintiffs named in Counts 2 to 219 of the complaint were paid on the basis of said revised scale from March 16, 1932 to December 31, 1932, and received and accepted without objection or protest said sums in full payment of all services rendered by them for said period.

"IV.

and not limited from equal to only one of the previous years during the work periods contained in the indictment, but rather to be held only upon proofs by the Board of Directors and governors in the provisions of this indictment, which is most specifically provided.

"Item, I, ... of and that in the monthly compensation agreement of the general auditor supervisions the word month shall be deemed to mean a full calendar month and that for company, building or like of premises under the working mechanics a distribution of the per diem shall be made monthly from said monthly compensation."

and replace further to provisions of indictment 2 of said document with provisions:

"Section 2. That the compensation levels of the general for the phrases of "monthly bills" or "monthly installments" or to further the expense of any period or payment, shall be construed or as approved by an adjustment of liability by the board of directors of any of said bills or "monthly installments" or of any project or process contained herein, but shall be regarded only as the provision of a fund or fund, for the payment thereof when said bills or monthly installments have been found to be valid and legal obligations against the industry. Payment of checks and when properly executed and issued by the board of directors, or when any project or process is approved and authorized by the board of directors of the industry directors or the same may be,

"4. Defendant alleges that all of the plaintiffs would in would not in the distribution of the indictment were paid on the basis of the full investigation employees for the entire year 1932 and related and payment without adjustment or project and when in full payment of all services rendered by them for said period and that plaintiff is, indeed and all plaintiffs based in County 2 to the indictment of the checkers were paid on the basis of full compensation released from January 1, 1932 to March 31, 1932, and received and accepted without adjustment or project and from in full payment of all services rendered by them for said period.

"5. Defendant alleges that in the previous financial statement of the activity, and in preparing a statement of activity, indicated and of many of the industry needed in January 1, 1932, including with the industry, approved and authorized of the industry or members of their relative industry, negotiations were had between the industry and the industry directors when the industry, after a further consideration as the wages of the plaintiff with the industry understanding that when the conditions were approved and a general wage scale should upon it would become effective as of date in 1932. That a period was made adjustments in the wage scale upon the industry directors in the negotiating area, the wages were the industry directors in June 1, 1932, which was made with the industry directors and employees of the industry, and that the board of directors in authorized with the power vested in them by statute and in accordance with Section 5 of the indictment contained herein for 1932, approved and authorized payment of said salaries on the revised scale on the basis of the full payment of the industry directors in a regular meeting held on June 24, 1932 from January of the resolution for 1932, said wages to be effective from said date of the industry directors and all industry employees in the industry. That plaintiff is, indeed and all plaintiffs based in County 2 to the indictment were paid on the basis of full payment of said salaries from June 24, 1932 to December 31, 1932, and received and accepted without adjustment or project and when in full payment of all services rendered by them for said period.

"And for a further and separate defense, defendant alleges, that after the services had been rendered by the plaintiffs for each semi-monthly period in 1932, and prior to the commencement of this suit, the plaintiffs upon receipt of the respective amounts admitted in said complaint to have been paid to said plaintiff by the defendant for services rendered for each semi-monthly period, executed receipts, releases and waivers, to the defendant of the several premises, and all demands and causes of action whatsoever which the plaintiffs then had against defendant, or might thereafter have or allege against it, by reason of said plaintiffs rendering services to the defendant for each semi-monthly period in 1932, as by the said receipts, releases and waivers will fully appear, a sample form copy of which is hereto attached. Said receipts, releases and waivers showing among other matters, on their face (a) Title of position, (b) Name and address of employee, (c) amount of payment, (d) Department employed in, (e) Period covered, (f) Release for all services rendered, and (g) Signature of employee.

"V.

"And for a further and separate defense, defendant alleges, that the plaintiffs by their actions in the premises have waived their right to claim additional compensation for services rendered during 1932 and by their actions are now estopped from enforcing their claims, if any, they may have had. Defendant alleges that for many years prior to 1932 and each year subsequent thereto, plaintiffs as members of their respective Unions, directed and authorized their Official Union Representatives to negotiate in their name and in their behalf with the defendant as to working conditions and wages to be paid said plaintiff employees and upon completion of said negotiations to accept without variation the result of said negotiations. Defendant alleges said salaries, as paid by it to the plaintiffs during 1932, were in accordance with the agreements made with the official Union Representatives appearing for and in behalf of said plaintiff employees, and said salaries were accepted by the plaintiffs without objection or complaint until the filing of this suit, five years after the services were rendered and the compensation paid to and received by the plaintiffs.

"This defendant denies that any of said plaintiffs are entitled to judgment as prayed in any of said Counts of the Complaint."

Attached to the answer is the following form:

"THE SANITARY DISTRICT OF CHICAGO
Identification, Salary Receipt, and Affidavit

Request for Mailing:
To the Paymaster:
This is your authority to mail my salary check, receipt of which is acknowledged hereon, to the following address:

_____

_____

_____
Signature of Employe.

NOTE: If check is to be mailed the request for mailing must be signed in addition to the execution of the affidavit and mailed to Room 600, 910 South Michigan Avenue.

Amount Payable This Period

1. Title of Position
2. Name and Address of Employee.
3. Amount of Voucher.
4. Dept.
5. Period Covered.

[illegible]

[illegible]

[illegible]

Approved by

x_____
Official in charge.

State of Illinois,)
County of Cook,) ss.

I, _____, on oath say that I have performed, to the best of my ability, the services and work required of me as an Employe of the Sanitary District of Chicago and have daily and regularly attended to the performance of said work. I make this affidavit for the purpose of receiving, and hereby acknowledge receipt of, the amount named above, being in full payment for services which were rendered by me in the capacity indicated above for the benefit and account of the Sanitary District of Chicago and during the time covered in the period above noted.

Subscribed and sworn to before me this _____day of _____ A. D. 193_

x_____
Notary Public.

x_____
Signature of Employe."

On December 31, 1936, plaintiffs were given leave to make additional parties plaintiff and to file additional counts to the complaint instanter. Thereupon plaintiffs filed their verified additional complaint. Except as to the names of the plaintiffs, occupations and the amounts sued for, additional counts 235 to 322, inclusive, 324, 325, 327 to 350, inclusive, and 358 are the same as count 2 of the original complaint; counts 326, and 355 to 357, inclusive, are the same as count 220 of the original complaint; and counts 323, 351 to 354, inclusive, and 359 are the same as count 220 except that the claims are for part of the year 1932 only.

Defendant filed its verified supplemental answer, in which it "denies that any of said additional parties plaintiff are entitled to judgment as prayed in any of the additional counts, numbered 235 to 359 inclusive, of the complaint, as all sums due to said additional plaintiffs for any services rendered to the defendant, have heretofore been paid in full by this defendant. This defendant, as to additional counts 235 to 359 inclusive of the complaint, for answer thereto adopts and herein incorporates by reference its answer as heretofore filed to counts 1 to 234 inclusive of the complaint."

Signed by

_____

Official in charge.

State of Illinois,
County of Cook, } ss.

I, _____, do hereby swear that I have carefully
read the foregoing statement, the contents and each paragraph of so
of the best of my ability, the truth and nothing but the truth, and
as an employee of the Chicago District Council of Carpenters and Joiners only
and regularly attached to the jurisdiction of said union. I also
this affirmation for the purpose of evidence, and further acknowledge
swear, or affirm, that I am not a member of any other organization
affiliated with the American Federation of Labor, or in the Building Trades
Department of the Chicago District Council of Carpenters and Joiners.

Subscribed and sworn to before me this _____day of _____
A. D. 193_.

_____

Notary Public.

_____

Signature of Deponent.

On December 30, 1934, officials were given leave to make additional public statement and to file additional records in the Anglo-Mexican Insurance. Thereupon plaintiffs filed their written affidavit complaint. Except as to the names of the plaintiffs, complaintant and the amounts sued for, additional counts 132 to 143, inclusive, 144, 145, 147 to 150, inclusive, and 152 are the same as counts 1 of the original complaint counts 108, and 109 to 129, inclusive, are the same as counts 2to of the original complaint, and counts 130, 131 to 134, inclusive, and 151 are the same as counts 110 except that the claims are for part of the year 1931 only.

Defendant filed its written petitions, answer, in which it denies that any of said additional Public plaintiff are entitled to judgment or proof in any of the additional counts, answered 132 to 134 inclusive, of the complaint, as all some due to said affiliated plaintiffs for any workers employed in the defendant, Burr Distributing Co. paid to IBEW by this defendant. This defendant, in its additional counts 132 to 134 inclusive of the complaint, for answer denies alleged and begin investigation by reference its answer or traversing filed to counts 1 to 131 inclusive of the complaint.

On November 17, 1937, plaintiffs filed their verified "Reply of Plaintiffs to Answer and Supplemental Answer," as follows:

"1. The plaintiffs deny all allegations of paragraph I-(e) of said answer which go beyond the allegations of the complaint and assert, under the guise of admissions, matters not alleged in said complaint.

"2. The plaintiffs deny the allegations of paragraphs 1, 2 and 3 of subdivision II of said answer.

"3. The plaintiffs deny the affirmative allegations of paragraph 1 of subdivision III of said answer except that the Sanitary District Act provided as quoted in said paragraph.

"4. The plaintiffs deny the allegations of paragraph 2 of said subdivision III except the allegations that the defendant's payrolls were not being met, that collection of some taxes were delayed and some taxes were not being paid and that the order quoted in said paragraph 2 from page 4 of the official proceedings for 1932 was adopted by said Board of Trustees on January 14th, 1932.

"5. The plaintiffs deny the allegations of paragraph 3 of said subdivision III except they admit that the Board of Trustees adopted the annual appropriation ordinance for the year 1932 as set out in plaintiffs' complaint and that the said ordinance contained the portions quoted in said paragraph 3.

"6. The plaintiffs deny the allegations of paragraphs 4 and 5 of said subdivision III.

"7. The plaintiffs deny the allegations of subdivision IV and V of said Answer and subdivision I of the said supplemental answer.

"8. The plaintiffs adopt all of the foregoing portions of this reply as their reply to subdivision II of the said supplemental answer."

Defendant contends that "conceding to the pleadings all reasonable evidentiary presumptions and deductions and the admittance of all facts of which judicial notice may be taken the plaintiffs' having failed to introduce further evidence did not meet the required burden of proof;" that "the trial court erred in refusing the tendered motions to direct a verdict in its favor and erred in giving the instruction as tendered by the plaintiffs." The position of plaintiffs is: "The defendant having failed in its answer to deny any allegation of fact in the complaint, but having alleged only affirmative defenses or supposed defenses, the allegations of the complaint stood admitted" under the pleadings, and as defendants failed to offer evidence as to the affirmative defenses plaintiffs, to sustain their case, were not required to offer any evidence and they were entitled

On December 12, 1972, plaintiffs filed their motion "Reply of plaintiffs to Answer and Supplemental Answer," as follows:

"1. The plaintiffs deny all allegations of paragraph 1-(a) of said answer which go beyond the allegations of the complaint and admit, under the guise of admissions, matters not alleged in said complaint.

"2. The plaintiffs deny the allegations of paragraphs 2, 3 and 4 of mobilization II of said answer.

"3. The plaintiffs deny the affirmative allegations of paragraph 5 of mobilization III of said answer, except that the defendants' statutory claims are pending in court in said litigation.

"4. The plaintiffs deny the allegations of paragraph 1 of said mobilization III except the allegations that the defendants' payrolls were not being used, that mobilization of some boxes were delayed and some boxes were and being held and that the money paid in said paragraph 1 from page 4 of the affidavit accompanying the brief was adopted by said Board of Trustees on January 21st, 1972.

"5. The plaintiffs deny the allegations of paragraph 2 of said mobilization III except they admit that the Board of Trustees adopted the annual appropriation ordinance for the year 1972 by a vote in plaintiffs' complaint and that the said ordinance included the particular quotes in said paragraph.

"6. The plaintiffs deny the allegations of paragraphs 6 and 7 of said mobilization III.

"7. The plaintiffs deny the allegations of mobilization IV and V of said answer and mobilization I of the said supplemental answer.

"8. The plaintiffs adopt all of the foregoing paragraphs of this reply as their reply to mobilization II of the said supplemental answer."

Defendant contends that "according to the plaintiffs' all reasonable evidentiary presumptions and inferences and the admissions of all facts of which judicial notice may be taken the plaintiffs' having failed to introduce further evidence did not meet the required burden of proof;" that "the trial court erred in refusing the tendered evidence to direct a verdict in its favor and erred in giving the instruction as tendered by the plaintiffs;" the position of plaintiffs is: "The defendants having failed in its answer to deny any allegations of fact in the complaint, but having alleged only affirmative defenses or argued defenses, the allegations of the complaint stand admitted" under the pleadings, and as defendants failed to offer evidence as to the affirmative defenses plaintiffs, in motion their case, were not required to offer any evidence and they were entitled

to such a verdict as the "fact allegations" of the complaint called for. In support of their assignment of cross-errors plaintiffs contend that "the first request for a directed verdict for plaintiffs ought to have been granted as to each plaintiff, because the January appropriation ordinance, properly construed, required it, and (a) there was no valid later reduction, nor (b) any evidence that any plaintiff came within the class to which the June reduction resolution applied." Plaintiffs further contend that under the pleadings it appears that plaintiffs were paid portions of their salaries on account and were not paid in full for any period. To this defendant answers: "It was the plaintiffs' obligation, before even a prima facie case could be established against the defendant, a municipal corporation, to designate specifically the law authorizing unquestionably the amount they claimed in the suit. This they failed to do. They were not civil service employees. Their term of appointment and compensation was subject to the will of the Board of Trustees of the defendant. The order adopted on January 14, 1932, before the Annual Appropriation Ordinance was passed, stated a 10 per cent reduction in wages was necessary and that when the budget and appropriation ordinance was thereafter adopted they should so provide. The Annual Appropriation Ordinance when adopted did specifically provide for a ten per cent deduction of wages and appropriated only 90 per cent of the previous year's salary for each position. The further reductions, as to union employees resulting from the conference with the authorized union representatives and thereafter ratified by the plaintiffs, made by the Order of June 16, 1932, were authorized by more than two-thirds vote of the Board of Trustees. The Board of Trustees were specifically empowered by Statute to fix the compensation of their employees and the actions taken in reducing the salaries were in complete accord with and pursuant to the powers vested in them."

In deciding the appeal and cross-appeal we have not considered the affirmative defenses, waiver and estoppel.

After a careful examination of the pleadings and the briefs

of the respective parties, we are unable to agree with plaintiffs' contention that defendant failed to answer or deny the material allegations of fact in the complaint. In defendant's answer, I (a), it specifically "denies that the plaintiffs were employed at the salary they infer or conclude is designated in the appropriation ordinance of this defendant for the year 1932." In I (e), defendant "denies, as alleged in paragraph 4 of Count 1 of the Complaint, that the plaintiff A. Anderson was employed as a Cable Splicer at a salary of $295.00 per month and denies that said amount was so designated in the appropriation ordinance of this defendant, for the year 1932, this defendant admits that said plaintiff performed the duties of his employment as a Cable Splicer during 1932 and admits that it paid to said plaintiff in full for said services the sum of $265.50 per month from January 1, 1932 to March 15, 1932, and $250.00 in full per month from March 16, 1932 to December 30, 1932, but defendant denies that there is a balance due and unpaid to the plaintiff for the year 1932, the sum of $501.25 or any other sum, as all sums due to said plaintiff for services rendered have been paid in full by this defendant." As to counts 2 to 234, inclusive, defendant for answer adopts and incorporates by reference subparagraphs (a), (b), (c), (d) and (e) of subdivision I set forth in its answer, and denies the allegation in paragraph 5 of counts 2 to 234, inclusive, of the complaint, that the plaintiff named in each of the respective counts was employed at the salary designated in said count, and denies that said alleged salary was so designated in defendant's appropriation ordinance for the year 1932; admits that the plaintiffs named in counts 2 to 234, inclusive, performed the duties of their positions during 1932, and admits that it paid to said plaintiffs for said services the amounts admitted in said counts to have been received by the plaintiffs for the periods designated during 1932, but states that said payments were payments in full and denies that there is a balance due and unpaid to any of said plaintiffs in the amount

of the respective parties, or its needs to agree with plaintiff's
contention that defendant failed to answer or deny the material
allegations of fact in the complaint. In defendant's answer, I (a),
it specifically denies that the plaintiffs were employed at the
salary they later on maintain is designated in the appropriation
estimates of this defendant for the year 1924.* In I (b), defendant
"denies" as alleged in paragraph 4 of count I of the complaint, that
the plaintiff ** herein were employed on a civil rolls at a salary
of $150.00 per month and denies that such amount was so designated in
the appropriation estimates of this defendant, for the year 1924*
this defendant admits that said plaintiff performed the duties of
his employment as a clerk rolls during 1924 and admits that it
paid to said plaintiff in full for such services the sum of $150.00
per month from January 1, 1924 to March 31, 1924 and $125.00 in full
per month from March 31, 1924 to December 31, 1924* but defendant
denies that there is a balance due and unpaid to the plaintiff for
the year 1924* the sum of $25.00 or any other sum, as all sums due
to said plaintiff for services rendered have been paid in full by this
defendant." In the answer I to (4* indicating) defendant for answer
admits and incorporates by reference subparagraphs (a) (b)* (c)
and (e) of subdivision I and states in its answer, and denies the
allegations in paragraph 7 of counts 2 to (4* indicating) of the com-
plaint, that the plaintiff named in each of the respective counts was
employed at the salary designated in said counts, and denies that such
alleged salary was so designated in defendant's appropriation
estimates for the year 1924 stating that the plaintiffs named in
counts 2 to (4* indicating) performed the duties of their positions
during 1924* and states that it paid to said plaintiffs for said
services the amounts indicated in said counts to have been rendered
by the plaintiffs for the periods designated during 1924* but states
that such payments were payments in full and denies that there is a
balance due and unpaid to any of said plaintiffs in the amount

designated in counts 2 to 234, inclusive, or in any other amount, as all sums due to said plaintiffs for their services have been paid in full by defendant.

Defendant contends that the following facts are admitted by the pleadings or are facts of such a nature that the court may take judicial notice of them: (a) In 1932 plaintiffs, employees of the Sanitary District, were not under civil service and the Board of Trustees of the District had statutory powers to fix their compensation. (b) In 1931 and 1932, and for a number of years thereafter, the Sanitary District, in common with all municipal governments in Cook county, was in desperate financial condition and a curtailment of its expenditures became necessary. (c) On January 14, 1932, an order was passed by defendant's Board of Trustees that stated the necessity of reducing expenses because of defendant's financial condition, and directed that the salaries of all employees be reduced ten per cent and that the budget and appropriation ordinance for 1932 be adjusted accordingly. (d) On January 28, 1932, the annual appropriation ordinance was adopted and specifically provided for a ten per cent reduction of salaries and appropriated only ninety per cent of the previous year's salary. (e) On June 14, 1932, after conferences with the authorized union representatives an agreed scale of wages was ordered by defendant's Board of Trustees, effective, by agreement, as of March 16, 1932. (f) All plaintiffs were paid the salaries provided in the annual appropriation ordinance from January 1, 1932, to March 15, 1932, and all plaintiffs except the union employees continued to receive such salaries during the entire year 1932. (g) The plaintiffs who were union employees were paid the salaries as reduced by the order of June 16, 1932, from March 16, 1932, to the end of the year 1932. (h) No objections as to the correctness of the amounts of the salaries that were paid by defendant to any of the plaintiffs were made by any of the plaintiffs until this suit was filed in October, 1936. Plaintiffs dispute the correctness of defendant's construction of the annual appropriation ordinance, and

Government in answer 2 to this Interrogatory, or in any other manner, as all need not be held liable for under analysis into terms paid in fact by Australia.

Defendant contends that the following facts are material:

(a) The payments on the faith of such a contract that the court may take judicial notice of them. (b) In 1919 plaintiffs' employees of the Railway Services were not under state control and the terms of various of the statutes for statutory powers to fix their conditions. (c) In 1918 and 1919, not far a number of years thereafter, the railway industry, in common with all industrial enterprises in that country, was in desperate financial condition and a continuous of its economists issued warning. (d) On January 14, 1919, on motion was passed by unanimously Board of Directors that stating the necessity of virtually economic measures of industrial disorganisation, and that the adoption of all measures to relieve the financial and that the budget and expenditure authorised for 1919 be reduced accordingly. (e) On January 28, 1919, the annual conference of the Railway Employees Society. (f) On June 24, 1919, statistics and reports of activity and expenditure only showed the same for that year. (g) On January 28, 1919, the annual conference and operationally provided for a 44 hour week and that the Board and expenditure authorised for 1919 be reduced accordingly. (h) On January 28, 1919, the annual conference of the Railway Employees Society. (i) On June 24, 1919, statistics and reports of activity and expenditure only showed the same for that year. (j) The Commonwealth Minister of Transport, by notice with the Commonwealth Conciliation Conference for adjustment made of wages and arranged by Australian Board of Transport, by agreement on 27 March 1919. (k) The plaintiffs were paid the salaries payable in the annual Commonwealth estimates from January 1, 1919, to March 17, 1919, and all plaintiffs except the minor employees continued to perform work relative during the entire period 1919. (l) The plaintiffs who were minor employees were paid the salaries as refixed by the order of June 24, 1919, from March 31, 1919, to the end of the year 1919. (m) No objections or in the interpretation of the amounts of the salaries that were paid by Australia in and of the plaintiffs were made by any of the plaintiffs until this suit was filed in October, 1920. Plaintiff's claims the monetary of the Plaintiff's constructions of the annual determinations, and the plaintiffs were made by any of the plaintiffs until this suit was filed in October, 1920. Plaintiff's claims the monetary

deny that they were paid the salaries provided in said ordinance.

In paragraph 2 of subdivision III of defendant's answer it states the desperate financial straits of the Sanitary District at the time in question; also the order passed by the Board of Trustees on January 14, 1932. An examination of the entire appropriation ordinance of 1932 shows that there was a ten per cent salary or wage reduction as to all employees of the Sanitary District. A. Anderson, the first plaintiff named in the complaint, was employed as a cable splicer; the second plaintiff, William J. Klass, as a system dispatcher. The part of the appropriation ordinance that covers these two positions is as follows:

	Per Month	Full Year
1933 - Line Maintenance		
4 Line Foremen, each	$ 335.00	$ 14,472.00
1 Cable Splicer Foreman	335.00	4,020.00
17 Linemen, each	295.00	54,162.00
4 Cable Splicers, each	295.00	12,744.00
8 Groundmen, each	225.00	19,440.00
4 Cable Splicers' Helpers, each	225.00	9,720.00
38 Total - Line Maintenance		$114,156.00
1934 - Station Operation Section. Substation Operation.		
1 Engineer of Substation Operation	$ 400.00	$ 4,125.00
4 System Dispatchers, each	121.50	13,824.00*

An inspection of the entire appropriation ordinance shows that the first column of figures represents the amounts paid each one of the positions per month in the prior year, and the figures in that column functioned merely as a base upon which to fix the amount to be paid for the positions during the year 1932. To illustrate from the above figures: As $12,744 was appropriated for the full year for four cable splicers, $3,186 was appropriated for each position for the full year, or $265.50 monthly, for each position. As $295 was paid monthly for that position in 1931, there was a monthly reduction in the 1932 ordinance of $29.50, or ten per cent, in the pay of a cable splicer. As the total appropriation for four system dispatchers was $13,824 for the full year, $3,456 was appropriated for the full year for each system dispatcher, so that the amount that was appropriated for the

deep that only some half the relative payment in will continue.

In paragraph 3 of subdivision III of Schedule's answer it states the corporate financial statis of the Industry Service as follows the corporate financial statis of the Industry Service as follows the 1x questions also the order payment by the Years of instrument on January 24, 1932, in connection of the return explanation continues of 1932 shows that there was a fair per-week activity so much relations as to all employees of the Industry Service. In however, the Iowa Industrial based in the complaint, was employed as a white epidemic the annual plantility utilizes 1, Iowa, as a system disposition, the part of the activitation volumes that answer those two positions is as follows:

Year	The Union Pacific Year
1931 - Line Statements	
A Line Payment, week	0 [illegible] 3 [illegible]
A Line Yields Payment	[illegible]
1/2 Lumber, week	[illegible]
A Line Yields	[illegible]
A Payment, week	[illegible]
A Line Yields Yields, week	[illegible]
Total - Line Statements	[illegible]

1932 - Station Positions Positions

A Employee of Operations Positions	0 [illegible] 3 [illegible]
A Iowa Industrial, week	[illegible]

In Inspection of the Union Representation conditions shows that the first column of figures represents the summer year which one of the positions per month in the price price, and the figures in that column transformed merely in a base upon total to fix the number to be paid for the positions during the year 1932. In distinction from the above statement, 0[illegible]0 was allocated for the full year for the month of [illegible]; in 0[illegible]0 was allocated for the full year for the month of [illegible]; 0[illegible]0 was allocated for each positions for the full year, or 0[illegible]0 monthly, the week positions. In 0[illegible] was paid monthly the positions in 1932, there was a monthly production in the 1932 [illegible] of 0[illegible]0 or two per month, in the pay of a white epidemic.

In the total allocations for Union Pacific distributions was 0[illegible] for the full year, 0[illegible] was allocated for the full year for each of the 0[illegible]0 monthly, the week positions. In 1932 was paid monthly the [illegible], 0[illegible] was allocated for each positions for the full year, [illegible]; in 0[illegible] was allocated for the full year for the month [illegible]; in 0[illegible] was allocated for the full year for the month [illegible] for the positions during the year 1932. In distinction from the above statement merely in a base upon total to fix the number to be paid positions per month in the price price, and the figures in that column first column of figures represents the summer year which one of the

In Inspection of the Union representation conditions shows that the

A Employee of Operations Positions	0 [illegible] 3 [illegible]
A Iowa Industrial, week	[illegible]

Total - Line Statements	[illegible]

1932 - Station Positions Positions

Year	The Union Pacific Year
A Line Payment, week	0 [illegible] 3 [illegible]
A Line Yields Payment	[illegible]
1/2 Lumber, week	[illegible]
A Line Yields	[illegible]
A Payment, week	[illegible]
A Line Yields Yields, week	[illegible]
Total - Line Statements	[illegible]

monthly pay of each dispatcher was $288. As the monthly salary for 1931 was $320, the amount appropriated in the 1932 ordinance represented a reduction of $32, or ten per cent. Even the salaries of the regular employees, such as the chief engineer, the principal assistant chief engineer, the consulting engineer, the assistant chief engineer, the assistant civil engineer and the secretary were reduced ten per cent. In other words, the appropriation ordinance of 1932 followed the order passed by the Board of Trustees on January 14, 1932. Plaintiffs' contention as to their first motion for a directed verdict for the full amounts alleged to have been deducted from each of plaintiffs' wages for the entire year 1932, aggregating $169,771.62, is based, necessarily, upon the theory that the salaries or wages of all plaintiffs were fixed in the annual appropriation ordinance of 1932 not in the amounts actually appropriated for said salaries or wages but at the figures stated in the first column, which, it appears, were the exact amounts of salaries or wages appropriated for the positions prior to 1932. As we stated in People ex rel. Mulvey v. City of Chicago et al., supra (p. 607), in passing upon a like contention: "Neither law, reason, nor custom, in our judgment, supports it." Plaintiffs have made a labored argument to distinguish the appropriation ordinance in the instant case and the appropriation ordinance in the Mulvey case, but we find no practical difference between the two. The argument of plaintiffs that the appropriation ordinance of 1932 should be interpreted to mean that the amounts appropriated for their salaries were merely payments on account cannot be sustained. As we stated in the Mulvey case (p. 605), if the amount appropriated for each position was merely a payment on account, "such a provision in an annual appropriation bill would be a most unusual one, and it would be expected that such intention would be expressed in apt words; but the annual appropriation bills for the years in question contain no words stating, or plainly indicating, that the amounts appropriated for the salaries of plaintiffs were merely payments on account." There is no language in the appropriation ordinance of 1932 that would warrant even

monthly pay of each disposition was high. As the monthly salary for 1931 was 6,000, the lowest appropriated in the 1931 estimates represented a reduction of 12% on the year's work. Then the salaries of the regular employees, such as the chief engineer, the principal assistant chief engineer, the municipal engineer, the assistant chief engineer, the assistant civil engineer and the secretary were reduced ten per cent. In other words, the appropriation estimates of 1931 followed the action taken by the Board of Commissioners on January 31, 1931. "Plausibility" substitutes as to their first notion for a diversion wanted for the full amount allowed to have been diverted from each of plausibility wages for the entire year 1931, appropriating 12% of it because necessarily, upon the theory that the minimum of wages of all plausibility were fixed in the annual appropriation estimates of 1931 not to the minimum actually appropriated the said minimum of wages had at the figures stated in the first column, which, it appears, were the exact amounts of salaries or wages appropriated for the positions paid in 1931. As we stated in Jones v. Ohio, 2 Ohio St. Dissenting at 14, Judge (p. 677), in passing upon a like contention "Whether low, reasonable, or excessive, is for judgment, anyone is." Plausibility have made a laborious argument to distinguish the appropriations estimates in the instant case and the appropriation estimates in the Jones case, but we find no practical difference between the two. The argument of plausibility that the appropriation estimates of 1931 should be interpreted to mean that the amounts appropriated for their salaries were merely payments on account subject to increase, is as stated in the Jones case (p. 677), if the amount appropriated for such position was merely a payment on account, "such a position is an absurd appropriation with which to a most unusual end, and it would be suggested that such interpretation would be expressive of any verity but the amount appropriations with for the years in question contain no words whatever, or partial indication, that the amounts appropriated for the salaries of plausibility were merely payments on account." There is no language in the appropriation estimates of 1931 that would warrant even

an inference that the amounts appropriated for the positions in question were intended merely as payments on account. The official order adopted by the Board of Trustees on January 14, 1932, recognized that if the Sanitary District was to continue to function, it was necessary, because of its extremely bad financial condition, to "reduce" the salaries of all employees ten per cent, and it orders that "the budget and appropriation ordinance of Sanitary District for the year 1932 be adjusted accordingly when adopted and passed." The appropriation ordinance of 1932 followed the order of January 14, 1932. Quoting again from the Bulvey case (pp. 607, 608): "In Gathemann v. City of Chicago, supra [263 Ill. 292], it was said (p. 297): 'If a statute or ordinance which authorizes the appropriation of money for the payment of a salary to a public officer or employee is indefinite or uncertain "the doubt should be resolved by adopting the smaller amount." (Tyrrell v. Mayor, 159 N. Y. 239.)' We are convinced that we should be announcing a new and dangerous rule to apply in the interpretation of annual appropriation bills if we were to sustain plaintiffs' position. We conclude that the annual appropriation bills fixed the salaries of the plaintiffs employed by the City in its corporate capacity at the amounts actually appropriated. Such cases as People ex rel. Lyle v. City of Chicago, 360 Ill. 25, cited by plaintiffs, have no application to the instant question, as they all involve situations where the salaries of the petitioners had been fixed by statute or general ordinance and the city council, in the annual appropriation bill, was required to appropriate the amounts fixed by the statute or general ordinance. In the Lyle case, the Supreme Court, after holding that Lyle was entitled to the writ because under sec. 11 of art. 9 of the constitution his salary, as a municipal court judge, could not be reduced by the city council during the term for which he was elected, saw fit to reannounce (p. 30) the following well-established principles to which we have heretofore referred." We adhere to what we there said. If we had any doubts as to the construction of the instant ordinance it would be our duty

so informed that the accused qualified for the position in question were intended merely as judgments on account. The criteria adopted by the Board of Trustees on January 14, 1970, presupposed that if the military service was to continue to function, it was necessary, because of its obscurity for financial constraints, to "judge" the criteria of all employees who put work, and it noted that "the subject and circumstances evidence of military training for the year 1970 to diminish accordingly when charged and passed." The appropriation estimate of 1970 refused the order of January 14, 1970. Quoting again from the Jackson case (pp. 847, 849): "In Patterson v. City of Chicago, supra (401 Ill. 194), it was said (p. 197): 'If a statute or ordinance which authorizes the appropriation of money for the payment of a salary to a public officer or employee is indefinite or uncertain "the doubt should be resolved by adopting the smaller amount." (Carroll v. Lynch, 319 Ill. 1.)' We are convinced that we should be announcing a new and dangerous rule if we apply to the interpretation of annual appropriations bills if we were to sustain plaintiffs' position. We conclude that the annual appropriation bills fixed the salaries of the plaintiffs employed by the City on its corporate equality at the amounts actually appropriated. Such cases as Peebles v. City of Chicago, 329 Ill. 1, 161 N.E. 97, relied by plaintiffs, have no application to the instant proceeding, as they all involve situations where the salaries of the petitioners had been fixed by statutes or general ordinance and the city council, in the annual appropriation bill, was required to appropriate the amounts fixed by the statute or general ordinance. In the instant case, the ordinance clearly, after holding that 1970 was entirely to the contrary, the ordinance in question, 21 of 1969, 7 of the constitution ill. 1970, as a municipal court judge, could not be reduced by the city council during the term for which he was elected, nor fix a maximum (p. 3) the "fixing of salaries-establishment principles in which we have jurisdiction referred," in order to what we think said. If we had any doubts as to the constitution of the instant ordinance it would be our duty

to resolve it in favor of defendant. But we are satisfied that defendant's construction of the ordinance is sound and that the construction placed upon it by plaintiffs is unsound.

What we have heretofore stated applies directly to plaintiffs' contention that their motion for a directed verdict for the full amount alleged to have been deducted from each of plaintiffs' wages for the entire year 1932, aggregating $160,771.62, should have been allowed, and we, therefore, dispose of that question first. We hold that the trial court was justified under the pleadings in denying said motion and therefore plaintiffs' cross-appeal is without merit.

There remains for consideration the appeal of defendant from the judgment order entered against it in the sum of $13,240.20, which was entered upon a directed verdict for the amounts alleged to have been deducted from the wages of 297 of the plaintiffs during the period from March 16, 1932, to June 15, 1932. None of said plaintiffs was a civil service employee and none had a vested right in the position he occupied. (People ex rel. v. Chicago Park District, supra, p. 381.) The Board of Trustees could hire or discharge them at will. The appropriation ordinance of 1932 did not appropriate sums to pay the plaintiffs, but it appropriated certain moneys to pay for certain positions. Section 4 of the Sanitary District Act of 1889 (Ill. Rev. Stat. 1939, ch. 42, par. 323) provides that the Board of Trustees "may prescribe the duties and fix the compensation of all the officers and employes of said sanitary district." It appears from the complaint that the proceedings of June 16, 1932, took place at a regular meeting of the Board of Trustees, at which a report of the Committee on Finance was presented to the Board. This report affected only employees who were members of trade unions. It states that the Committee, after conferences with the representatives of the various trade unions, reached an agreement as to pay which was satisfactory to all concerned. The report presented to the Board "Reduced Union Scales Effective March 15, 1932," and upon a roll call the motion of the Committee to have the said scales adopted

to rejoice it in favor of defendant. But we are satisfied that defendant's construction of the evidence is sound and that the administrative phase upon it by plaintiff's is unsound.

That we have heretofore stated applies directly to plaintiff's contention that their action for a directed verdict for the full amount alleged to have been defaulted from week of plaintiff's wages for the entire year 1944, aggregating $[illegible], should have been allowed, and we, therefore, dispose of that question first. We hold that the trial court was justified under the pleadings in denying said motion and therefore plaintiff's cross-appeal is without merit.

There remains for consideration the appeal of defendant from the judgment order entered against it in the sum of $[illegible], which was entered upon a directed verdict for the amount alleged to have been defaulted from the wages of 227 of the plaintiffs during the period from June 16, 1944, to June 16, 1945. Some of said plaintiffs was a steel service employee and made but a varied right in the positions he occupied. (Pennie on rel. v. Delaware Tool Industry, supra, p. 343.) The board of trustees could hire or discharge them at will. The appropriation ordinance of 1944 did not appropriate sums to pay the plaintiffs, but it appropriated certain moneys to pay for certain positions. Section 4 of the municipal budget Act of 1939 (III. Rev. Stat. 1939, ch. 42, par. 311) provides that the Board of Trustees "may prescribe the duties and fix the compensation of all the officers and employees of said municipal district." It appears from the complaint that the proceedings of June 16, 1944, took place at a regular meeting of the Board of Trustees, at which a report of the committee on finance was presented to the Board. This report affected only employees who were members of trade unions. It shows that the committee, after conferences with the representatives of the various trade unions, recommended an agreement as to pay which was satisfactory to all concerned. The report presented to the Board "Endorsed Union Labor Effective June 16, 1944," and upon a roll call the action of the committee to have the said trades adopted

was carried by a unanimous vote of the Trustees. Plaintiffs allege in their complaint that they had no notice or knowledge during the year 1932 of the said proceedings of the Board of Trustees. Defendant, in its answer, admits the proceedings of June 16, 1932, admits that the reduced wage scale was agreed upon between the union representatives and the Sanitary District, "which [agreement] was made with the full knowledge, consent and approval of the plaintiffs * * *. That plaintiff A. Anderson and all plaintiffs named in Counts 2 to 219 of the complaint were paid on the basis of said revised scale from March 16, 1932 to December 31, 1932, and received and accepted without objection or protest said sums in full payment of all services rendered by them for said period." When additional parties plaintiff were made, defendant made a like answer as to said plaintiffs. The 297 plaintiffs affected by the order of June 16, 1932, made no proof to sustain their allegation in the complaint that they had no notice or knowledge during the year 1932 of the said proceedings of the Board of Trustees. A fortiori, they do not allege that the Committee on Finance did not agree with the representatives of the various trade unions as to the reduced union scales to be paid the union employees, nor that they did not know of such agreement, and each of said plaintiffs admits receiving pay at the reduced rate and none alleges that he received the payments under protest. It must be also noted that plaintiffs do not charge fraud or bad faith in the actions of the Board of Trustees in fixing the wages to be paid them.

In a final effort to sustain the judgment for $13,240.30 the plaintiffs in question make the far-fetched argument that there is nothing in the pleadings to indicate that any of them came within the class covered by the reduction order of June 16, 1932. There is not the slightest merit in this contention. For example: A. Anderson, plaintiff, alleges that he was employed as a "cable splicer." The 1932 appropriation ordinance appropriates for four cable splicers. The "Reduced Union Scales Effective March 15, 1932, as Approved by the Board of Trustees of The Sanitary District at Meeting June 16,

not marked by a unanimous vote of the trustees. Plaintiffs allege in their complaint that they had no notice or knowledge during the year 1931 of the annual proceedings of the Board of Trustees. Defendant, in its answer, admits the proceedings of July 14, 1931, insists that the pledged sums initially were agreed upon between the union representatives and the industry minister, "which [agreement] was made with the full knowledge, assent and approval of the plaintiffs - - -, that plaintiff c. salesmen and all plaintiffs agreed to remain i to 1931 or the employing were paid on the basis of sums received monts from March 14, 1931 to December 31, 1931, and received and accepted without objection or protest such sums in full payment of all services rendered by them for said period." Then additional pension plaintiff were made, defendant made a like answer as to said plaintiffs. The 1931 plaintiffs affected by the action of June 14, 1931, made no proof to sustain their allegations in the complaint that they had no notice or knowledge during the year 1931 of the annual proceedings of the Board of Trustees. A DEFENSE, they do not allege that the Constitute on pleadings did not agree with the representatives of the various trade unions to be the pledged union sums to be paid the union employees, but that they did not know of such agreement, and such of said plaintiffs, admitting pay at the pledged rate and some allege that he received the payments under protest. It must be also noted that plaintiffs do not charge fraud or bad faith in the actions of the Board of Trustees in fixing the sums to be paid them.

In a final effort to sustain the judgment for $11,000.00 the plaintiffs in question make the six-fronted argument that there is nothing in the pleadings to indicate that any of them were within the class covered by the resolution under of June 14, 1931. There is not the slightest merit in this contention. For example: A. Jackson, plaintiff, alleges that he was employed as a "table splicer." The 1931 appropriation ordinance appropriates for that table splicers. The "minus three table splicers" March 19, 1931, as approved by the Board of Trustees of the Industry District is dated June 14,

1932," includes "Cable Splicers," and Anderson alleges that he was paid from March 16 to the end of the year 1932 at the wage fixed in the order of June 16, 1932. The same situation applies as to each of the other plaintiffs affected by that order. The trial court erred in refusing defendant's instruction for a directed verdict and in entering judgment for said plaintiffs in the sum of $13,240.20.

In the Mulvey case we said (p. 411): "While it is regrettable that the extremely bad financial condition of the City, due to the great depression, necessitated reductions in the salaries of the plaintiffs, it is a matter of common knowledge that during the same period practically all employees in the United States sustained reductions in their salaries or wages. Millions of employees lost their positions, and a very great number of these were forced to go upon relief to obtain support for their families and themselves. Millions are still unemployed and on relief. Despite the adverse conditions that confronted the City it retained in its employ all of the plaintiffs and those engaged in like employment, and it asserts its willingness and hope to restore the former salaries as soon as its financial condition will permit it to do so. We are constrained to believe that the instant claims were the result of an afterthought." What we there said applies with equal force to the instant case.

That part of the judgment order of the Superior court of Cook county entered March 4, 1938, denying plaintiffs' motion for a directed verdict "covering the entire period from January 1st, 1932, to December 31st, 1932," is affirmed. That part of the same judgment order denying plaintiffs' motion for a directed verdict "covering the period from January 1st, 1932 to June 15, [January 28] 1932," is affirmed. That part of the same judgment order which awards judgment in favor of 297 plaintiffs and against defendant, "covering a period of from the 16th day of March, 1932 to the 15th day of June, A. D. 1932," is reversed. The cross-appeal of plaintiffs is dismissed.

JUDGMENT ORDER AFFIRMED IN PART AND REVERSED IN PART. CROSS-APPEAL OF PLAINTIFFS DISMISSED.

Sullivan, P. J., and Friend, J., concur.

$\Delta\Delta\Delta_1$" indicates "white injunctions," and numerous allegations that he was paid from funds $\Delta\Delta$ to the end of the year $\Delta\Delta\Delta$ as the very direct in the order of June 14, $\Delta\Delta\Delta$. The same circumstances applies as to each of the other plaintiffs affected by that order. The trial court overruled defendant's demurrers for a diversee verdict and in entering judgment for said plaintiffs in the sum of $\Delta\Delta\Delta_1$.

In the Dalton case we read (p. $\Delta\Delta\Delta$): "While it is a propositions that the economic and financial condition of the city, due to the great depression, necessitated reductions in the salaries of the plaintiffs, it is a matter of common knowledge that during the same period practically all employees in the public offices suffered reductions in their salaries or wages. Citizens of employees lost their positions, and a very great number of those were forced to go upon relief to obtain support for their families and themselves. Citizens are still unemployed and on relief. Despite the adverse conditions that overwhelmed the city it evaded in its employ all of the plaintiffs and those employed in other employment, and it avoids the obligations and seeks to restore the former salaries as soon as the financial conditions will permit it to do so. We are constrained to believe that the Instant salaries were the result of an afterthought," that we have said applies with equal force to the instant case.

That part of the judgment order of the superior court of Cook county entered March 4, $\Delta\Delta\Delta_1$, enjoining plaintiffs' motion for a diversed verdict "overruling the entire payment from January 1st, $\Delta\Delta\Delta_1$, to December $\Delta\Delta\Delta_1$, $\Delta\Delta\Delta$" is affirmed. That part of the same judgment order denying plaintiffs' motion for a diversed verdict "overruling the period from January 1st, $\Delta\Delta\Delta_1$, to June 1st, [January 1st] $\Delta\Delta\Delta_1$" is affirmed. That part of the same judgment order which sustain judgment in favor of $\Delta\Delta\Delta$ plaintiffs and against defendant, "providing a period of from the 14th day of June, $\Delta\Delta\Delta$ to the 31st day of June, 1. e. $\Delta\Delta\Delta_1$" is reversed, the cross-appeal of plaintiffs is dismissed.

Judgment order affirmed in part and reversed in part.

Dalton, Administrator of Plaintiffs-Appellees.

Dalton, Administrator of Plaintiffs-Appellees.

Mulvihill, v. Ira and Friends, $\Delta\Delta$ counsel.

304 Ill. App.

40416

GLENN H. GADDIS, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR
THOMAS D. NASH, County Treasurer and Ex Officio County Collector of Cook County, Appellee.	)	COURT OF COOK COUNTY.

304 I.A. 259

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for damages for alleged wrongful trespass by the latter upon the property of plaintiff without due process of law. Defendant filed a second amended motion to strike plaintiff's complaint and dismiss the cause upon the ground, inter alia, that there had been a former adjudication of the cause of action stated in the complaint. The trial court after hearing oral arguments and considering written briefs of the respective counsel sustained defendant's motion and ordered that the complaint be stricken, and the cause dismissed "upon the merits at plaintiff's costs and judgment is hereby rendered for the defendant, Thomas D. Nash, and against the plaintiff, Glenn H. Gaddis * * *." Plaintiff appeals.

The principal contentions of plaintiff are predicated upon an incorrect record filed by him in this court. After defendant, by leave of court, filed a corrected record it became apparent that there is no merit in this appeal. Defendant bitterly criticizes plaintiff's action in basing his appeal upon a record that defendant contends plaintiff knew to be incorrect. Plaintiff's answer to defendant's criticisms is: "The plaintiff was bound to base his brief and abstract upon the record certified to by the clerk," and states that if the record filed by plaintiff was incomplete it "was entirely due to the fault of the defendant in

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for damages for alleged wrongful trespass by the latter upon the property of plaintiff without due process of law. Defendant filed a second amended motion to strike plaintiff's complaint and dismiss the cause upon the ground, inter alia, that there had been a former adjudication of the same of action stated in the complaint. The trial court after hearing oral arguments and considering written briefs of the respective counsel sustained defendant's motion and ordered that the complaint be stricken, and the cause dismissed "upon the merits at plaintiff's costs and judgment is hereby rendered for the defendant, Thomas D. Ewing, and against the plaintiff, Glenn E. Gaddis * * *." Plaintiff appeals.

The principal contentions of plaintiff are predicated upon an incorrect record filed by him in this court. After defendant, by leave of court, filed a corrected record it became apparent that there is no merit in this appeal. Defendant bitterly criticizes plaintiff's action in basing his appeal upon a record that defendant contends plaintiff knew to be incorrect. Plaintiff's answer to defendant's criticisms is: "The plaintiff was bound to take his brief and abstract upon the record certified to by the clerk," and states that if the record filed by plaintiff was incomplete it "was entirely due to the fault of the defendant in

not serving full, true and complete copies of his second amended motion and especially of the order mentioned under the rules of court upon the opposite party, together with the various exhibits referred to and complained of by him to be a part of the additional and corrected record." It was the duty of plaintiff, appellant, to see that a correct record was filed in this court and it was certainly not commendable practice to base arguments upon a record that counsel must have known to be incorrect. Not only was the judgment order in the Circuit court case emasculated in the record filed by plaintiff, but the record does not contain copies of the pleadings in the Circuit court action which were attached to defendant's second amended motion in the instant case, and which were all important in determining the question of res judicata.

While defendant's second amended motion set up a number of grounds in support of the motion, it is agreed by the parties that the court's action in sustaining the motion was based upon the defense of former adjudication. Plaintiff states in his brief that "the theory of the defendant so far as disclosed appears to be, that there has been a former adjudication of the plaintiff's cause of action; all other reasons appearing to be of minor importance. Such other reasons were not argued in the trial court." Defendant states that "the ruling of the trial court, as stated in appellant's brief, was based upon the estoppel of the prior judgment."

The gist of the complaint in the instant case is that defendant, "Thomas D. Nash, County Treasurer and Ex Officio County Collector of Cook County," unlawfully took possession of plaintiff's property on April 26, 1934, and held possession of the same until December 1, 1934. It appears from the complaint that defendant, while county treasurer of Cook county, was appointed receiver for the property of plaintiff by the Circuit court of Cook county in a suit instituted by The People of the State of Illinois pursuant to the provisions of the Skarda Act (Smith-Hurd Ill. Rev. Stat. 1933, ch. 120, pars. 238a-238c). The complaint alleges that the act of the defendant,

not serving full, true and complete copies of his second amended motion and especially of the order mentioned under the rules of court upon the opposite party, together with the various exhibits referred to and complained of by him to be a part of the additional and corrected record." It was the duty of plaintiff, appellant, to see that a correct record was filed in this court and it was certainly not reasonable practice to base arguments upon a record that happened must have known to be incorrect. Not only was the judgment order in the Circuit court case omissionated in the record filed by plaintiff, but the record does not contain copies of the pleadings in the Circuit court action which were attached to defendant's second amended motion in the instant case, and which were all important in determining the question of res judicata.

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The gist of the complaint in the instant case is that defendant, "Thomas T. Mann, County Treasurer and Ex-Officio County Collector of Cook County," unlawfully took possession of plaintiff's property on April 26, 1934, and held possession of the same until December 1, 1934. It appears from the complaint that defendant, while county treasurer of Cook county, was appointed receiver for the property of plaintiff by the Circuit court of Cook county in a suit instituted by The People of the State of Illinois, pursuant to the provisions of the Bluff Act (Smith-Burd Ill. Rev. Stat. 1933, ch. 110, pars. 208-230). The complaint alleges that the act of the defendant,

as such receiver, in taking possession of the property, was wrongful because summons was not served upon plaintiff in the receivership proceeding; that he had no knowledge of the proceeding, and did not consent to the defendant's appointment as receiver nor to his possession of the property. In referring to defendant's verified second amended motion, upon which the trial court entered the instant judgment, we will notice only such parts of the same as apply to the defense of former adjudication. The said motion sets forth in detail all of the alleged proceedings had in the prior suit, and copies of all of the pleadings filed therein are attached to the motion and made a part thereof. It also sets forth defendant's several motions to dismiss, and the several orders of the Circuit court sustaining such motions, including the final judgment of that court entered July 6, 1937. The motion is supported by an affidavit of one of the counsel for defendant in both actions, which states, inter alia, that the matters and things set forth in the motion to dismiss are true in substance and in fact, "and all of such matters and things are, for the sake of brevity hereby incorporated in this affidavit with like effect as if they were here repeated in this affidavit." Section 48 of the Civil Practice Act (Ill. Rev. Stat. 1939, ch. 110, par. 172) provides: "Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the said following defects exist but do not appear upon the face of the complaint: * * * (e) That the cause of action is barred by a prior judgment. * * *" Plaintiff's counter-affidavit to defendant's said motion did not question the correctness of the pleadings and judgment as set forth in defendant's said motion, and the issue of the defense of res judicata was properly determined by the trial court as a question of law.

From an examination of the complaints filed by plaintiff in the prior action in the Circuit court and the complaint filed by him

as such receiver, in taking possession of the property, was wrongful because authority was not granted upon plaintiff in the receivership proceeding; that he had no knowledge of the proceeding, and did not consent to the defendant's appointment as receiver nor to its possession of the property. In referring to defendant's verified second amended motion, upon which the trial court entered the instant judgment, we will notice only such parts of the same as apply to the defense of former adjudication. The said motion sets forth in detail all of the alleged proceedings had in the prior suit, and copies of all of the pleadings filed therein are attached to the motion and made a part thereof. It also sets forth defendant's several motions to dismiss, and the several orders of the district court sustaining such motions, including the final judgment of that court entered July 6, 1937. The motion is supported by an affidavit of one of the counsel for defendant in both actions, which states, inter alia, that the matters and things set forth in the motion to dismiss are true in substance and in fact, "and all of such matters and things are, for the sake of brevity hereby incorporated in this affidavit with like effect as if they were here repeated in this affidavit." Section 60 of the Civil Practice Act (Ill. Ann. Stat. 1937, ch. 110, par. 1272) provides: "Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, and he may within the same time, file a similar motion supported by affidavits where any of the said following defects exist but do not appear upon the face of the complaint: * * * (e) That the cause of action is barred by a prior judgment. * * *" Plaintiff's counter-affidavit to defendant's said motion did not question the correctness of the pleadings and judgment as set forth in defendant's said motion, and the issue of the defense of res judicata was properly determined by the trial court as a question of law.

From an examination of the complaints filed by plaintiff in the prior action in the district court and the complaint filed by the

in the instant action it clearly appears that the subject matter of both suits is the same. Both suits allege a trespass upon the same property. Indeed, the second amended complaint filed by plaintiff in the Circuit court is practically the same as the complaint filed in the instant action, and from the said complaints it appears that the plaintiff and defendant in the instant proceeding were parties to the Circuit court action. The record also shows that plaintiff did not appeal from the judgment entered in the Circuit court case.

Plaintiff contends that the judgment entered in the Circuit court was not a final judgment upon the merits but merely an interlocutory judgment, and, was therefore, not appealable. The corrected record shows that the following judgment order was entered in the Circuit court proceeding on July 6, 1937:

"Glenn H. Gaddis v. Thomas D. Nash, individually No. 35C 5756

"This cause coming on to be heard upon the motion filed herein by Thomas D. Nash, individually, party defendant herein, to strike plaintiff's second amended complaint heretofore filed in this cause. After arguments of counsel and due deliberation by the court said motion is sustained and plaintiff's second amended complaint herein stricken as to said defendant.

"Thereupon it is ordered by the court that this cause be and the same is hereby dismissed as to said defendant at plaintiff's costs.

"Therefore, it is considered by the court that the defendant Thomas D. Nash, individually, do have and recover of and from the plaintiff, Glenn H. Gaddis, his costs and charges in this behalf expended and have execution therefor.

"HARRY M. FISHER" (Italics ours.)

The part of the order that we have italicized was omitted from the record filed by plaintiff in this court. This judgment order was clearly an appealable one but plaintiff did not see fit to appeal from the same. Can there be any doubt that if plaintiff had appealed from

in the instant action is clearly evident that the subject matter of both suits is the same. Both suits allege a trespass upon the same property. Indeed, the second amended complaint filed by plaintiff in the Circuit court is practically the same as the amended filed in the instant action, and from the said complaints it appears that the plaintiff and defendant in the instant proceeding were parties to the Circuit court action. The record also shows that plaintiff did not appeal from the judgment entered in the Circuit court case.

Plaintiff contends that the judgment entered in the Circuit court was not a final judgment upon the merits but merely an interlocutory judgment, and, therefore, not appealable. The corrected record shows that the following judgment order was entered in the Circuit court proceeding on July 6, 1937:

"Glenn K. Daddis v. Thomas B. Nash, individually, No. 1[illegible] 1936

"This cause coming on to be heard upon the motion filed herein by Thomas B. Nash, individually, party defendant herein, to strike plaintiff's second amended complaint herein filed in this cause, after arguments of counsel and due deliberation by the court and motion is sustained and plaintiff's second amended complaint herein stricken at his sole costs.

"It is ordered by the court that this cause be and the same is hereby dismissed as to said defendant at plaintiff's costs.

"Therefore, it is considered by the court that the defendant Thomas B. Nash, individually, do have and recover of and from the plaintiff, Glenn K. Daddis, his costs and charges in this behalf expended and have execution therefor.

"HENRY M. FLEMING" (Italics ours.)

The part of the order that we have italicized was omitted from the pleading filed by plaintiff in this court. This judgment order was clearly an appealable one but plaintiff did not see fit to appeal from the same. The record shows that if plaintiff had appealed from

this judgment order that a motion of defendant to dismiss the appeal upon the ground that the order was not a final one would have been denied? We think not. It further appears from the record that plaintiff dismissed the Circuit court action as to the remaining defendant, Robert M. Sweitzer, on October 19, 1937. The instant proceedings were started in the Circuit court December 29, 1937. We have carefully considered the authorities cited by plaintiff in support of his contention that the judgment order of the Circuit court was not a final one, and we find that they do not apply to a judgment like the one entered by said court. The argument of plaintiff in support of the instant contention is practically based upon the incorrect record. In his argument plaintiff calls attention to the fact that defendant's second amended motion and the record show that Robert M. Sweitzer was also a defendant in the prior suit and that he was still a defendant after the entry of the judgment order of July 6, and plaintiff infers that in this state of the record he could not have appealed from the judgment dismissing the suit as to Nash. This inference is based, apparently, upon the old rule of appellate procedure which required a disposition as to all parties defendant before a plaintiff could appeal from a judgment of dismissal as to one of them. But section 50 of the Civil Practice Act (Ill. Rev. Stat. 1939, ch. 110, par. 174) provides: "(1) Judgment may be given * * * for or against one or more of several defendants * * *. Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded, and more than one judgment may be rendered in the same cause. (2) Any party aggrieved by any such judgment may have a review thereof as herein provided, even though said cause remains undisposed of as to other parties."

Plaintiff contends that "the record of the defendant made in support of his motion is entirely void of any showing, that the court in the former cause had jurisdiction. It cannot well be

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Plaintiff contends that "the record of the defendant appearing in support of his motion is entirely void of any showing, that the court in the former cause had jurisdiction. It cannot will be

assumed that a court had jurisdiction in a former cause; the record should so show." It is difficult to regard this contention as seriously made. The record shows that the former action was one for trespass upon certain property belonging to plaintiff, and his present action was brought for the same trespass upon the same property. The Circuit court of Cook county is a court of general jurisdiction and had jurisdiction of the subject matter of the first action brought by plaintiff. Indeed, by bringing the instant action in the Superior court, which has the same jurisdiction as the Circuit court, he impliedly concedes, as he must, that the Circuit court had jurisdiction of the first action.

The instant appeal depended for its vitality upon an incorrect record. When the corrected record was filed it became apparent that there is no merit in the appeal.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

assumed that a court had jurisdiction in a tenor sense; the writ should so show." It is difficult to regard such assertions as seriously made. The record shows that the former action was one for trespass upon certain property belonging to plaintiff, and his present action was brought for the same trespass upon the same property. The Circuit court of Cook county is a court of general jurisdiction and had jurisdiction of the subject matter of the first action brought by plaintiff. Indeed, by bringing the instant action in the superior court, which has the same jurisdiction as the Circuit court, he impliedly concedes, as he must, that the Circuit court had jurisdiction of the first action.

The instant appeal depended for its vitality upon an incorrect premise. Upon the mandated record we find it beyond question that there is no merit in the appeal.

The judgment of the superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Mullins, J., and Friend, J., concur.

40972

GERTRUDE WEBB, Administratrix of the Estate of WILLIAM D. WEBB, Deceased,
(Plaintiff) Appellant,

v.

THE WILLETT COMPANY, a corporation, and JOHN KRETT,
Defendants.

THE WILLETT COMPANY, a corporation,
(Defendant) Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Gertrude Webb, administratrix of the estate of William D. Webb, deceased, sued The Willett Company, a corporation, and John Krett, for damages sustained by the heirs at law and next of kin by reason of the wrongful death of the deceased. The latter met his death when the automobile he was driving was struck by an automobile tractor owned by The Willett Company and driven by one of its employees, John Krett. At the conclusion of all of the evidence the trial court instructed the jury to find The Willett Company not guilty. In obedience to the court's instruction the jury returned a verdict of not guilty as to The Willett Company. The jury found John Krett, defendant, guilty and assessed plaintiff's damages at $10,000. Judgment was entered upon both verdicts. Krett did not appeal. Plaintiff has appealed from the judgment entered in favor of The Willett Company.

The only question involved in this appeal is, Was Krett, at the time and place in question, a servant or agent of defendant The Willett Company? Plaintiff contends that under all the facts and circumstances that question was one of fact for the jury to determine, and that the trial court erred in directing a verdict as to The Willett Company. The Willett Company (hereinafter called

MR. JUSTICE BRANDEIS DELIVERED THE OPINION OF THE COURT.

Patrick Kreitt, administrator of the estate of William S. Kreitt, deceased, sued The Willett Company, a corporation, and John Kreitt, for damages sustained by the heirs at law and next of kin by reason of the wrongful death of the deceased. The latter met his death when the automobile he was driving was struck by an automobile truck owned by The Willett Company and driven by one of its employees, John Kreitt. At the conclusion of all of the evidence the trial court instructed the jury to find The Willett Company not guilty. In obedience to the court's instruction the jury returned a verdict of not guilty as to The Willett Company. The jury found John Kreitt, defendant, guilty and assessed plaintiff's damages at $10,000. Judgment was entered upon both verdicts. Kreitt did not appeal. Plaintiff has appealed from the judgment entered in favor of The Willett Company.

The only question involved in this appeal is, Was Kreitt, at the time and place in question, a servant or agent of defendant, The Willett Company? Plaintiff contends that under all the facts and circumstances that question was one of fact for the jury to determine, and that the trial court erred in directing a verdict as to The Willett Company. The Willett Company (certiorari being

defendant) concedes that it owned the tractor automobile involved in the case and that Krett was employed by it, and further concedes that at the time that plaintiff closed her case she had made out a prima facie case against defendant. Defendant states its position as follows: "It is our contention that the plaintiff's evidence raised only a legal presumption. John Krett was admittedly an employee of the defendant, The Willett Company, and was operating a Willett truck. We contend that this evidence only amounted to a presumption of agency and that the defendant's evidence entirely obliterated the presumption by the proof of definite facts. The jury were bound to believe the evidence of the defendant's witnesses, they being unimpeached and uncontradicted. The undisputed evidence was that John Krett, at the time and place of the accident in question, was not engaged in the furtherance of any business for the defendant, The Willett Company, and this evidence being conclusive, it became the duty of the trial court to withdraw the case from the consideration of the jury and direct a verdict."

In Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 109, 110, we said: "A number of personal injury cases have recently come to this court wherein juries had been directed to find for defendants where it appeared that the plaintiffs had made out a prima facie case, and we, therefore, deem it advisable to restate long settled principles of law that govern the action of a court in passing upon a motion to direct a verdict for the defendant in cases of this character. '"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the

defendant) concedes that it owned the tractor automobile involved in the case and that Kretz was employed by it, and further concedes that at the time that plaintiff closed her case she had made out a prima facie case against defendant. Defendant states its position as follows: "It is our contention that the plaintiff's evidence raised only a legal presumption. John Kretz was admittedly an employee of the defendant, The Willett Company, and was operating a Willett truck. We contend that this evidence only amounted to a presumption of agency and that the defendant's evidence entirely obliterated the presumption by the proof of definite facts. The jury were bound to believe the evidence of the defendant's witnesses, they being unimpeached and uncontradicted. The undisputed evidence was that John Kretz, at the time and place of the accident in question, was not engaged in the furtherance of any business for the defendant, The Willett Company, and this evidence being conclusive, it became the duty of the trial court to withdraw the case from the consideration of the jury and direct a verdict."

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evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7.)' (Mahan v. Richardson, 284 Ill. App. 493, 495.)" (Italics ours.) In Shannon v. Nightingale, 321 Ill. 168, the decision, like in the instant case, turned upon the question of agency. There the court said (p. 176): "On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor."

Defendant, to sustain its position, called two witnesses, Robert M. Anderson, its operating superintendent, and David Horst, the night superintendent of maintenance at its main garage, located at 700 South Desplaines street. It covered half a block and housed a great number of "trucking equipment." Defendant had twelve other garages. For many years Krett had been employed by defendant as a washer. Anderson and Horst both testified that the latter had control and authority over the handling and movements of defendant's motor equipment; that defendant before and at the time of the accident had certain rules and regulations relative to the use and operation of the motor equipment; that one of the rules was that anyone who wished to use any of the equipment had to go to Horst during the night time, and to Horst or any one of the several foremen during the daytime, and obtain permission to take or use any motor equipment before he had the right to take or use the same; that such a rule had been brought to the attention and knowledge of Krett. Anderson, upon direct, was permitted to testify, over the objection of plaintiff, that Krett, in the use of the tractor, at the time of the accident was not doing any business for defendant or furthering any of its interests. Plaintiff's objection to the question that brought out that testimony should have been sustained, as the witness had already testified that he had no personal knowledge as to the taking of the tractor automobile by Krett on the night in

evidence, - we can look only at that which is favorable to appellant. Tate v. Yess, 257 III. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Nash, 273 id. 489." (Hunter v. Trump, 317 III. 293, 296-7.)'

(Mahan v. Richardson, 264 III. App. 493, 497.)" (Italics ours.) In Emerson v. Stringfield, 341 III. 164, the decision, like in the instant case, turned upon the question of agency. There the court said (p. 170): "On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor."

Defendant, to sustain its position, called two witnesses, Robert E. Anderson, its operating superintendent, and David Horst, the night superintendent of maintenance at its main garage, located at 700 South Desplaines street. It covered half a block and housed a great number of "running equipment." Defendant had twelve other garages. For many years Kreft had been employed by defendant as a washer. Anderson and Horst both testified that the latter had control and authority over the handling and movements of defendant's motor equipment; that defendant before and at the time of the accident had certain rules and regulations relative to the use and operation of the motor equipment; that one of the rules was that anyone who wished to use any of the equipment had to go to Horst during the night time, and to Horst or any one of the several foremen during the daytime, and obtain permission to take or use any motor equipment before he had the right to take or use the same; that such a rule had been brought to the attention and knowledge of Kreft. Anderson, upon direct, was permitted to testify, over the objection of plaintiff, that Kreft, in the use of the tractor, at the time of the accident was not doing any business for defendant or furthering any of its interests. Plaintiff's objection to the question that brought out that testimony should have been sustained, as the witness had already testified that he had no personal knowledge as to the taking of the tractor automobile by Kreft on the night in

question, and that the first time he heard that Krett had used defendant's tractor on the early morning of September 11, 1937, was shortly after the accident. Upon cross-examination the witness testified that Krett washed cars at the main garage and at other garages of defendant; that one of the other garages was located at 16th and Rockwell streets, and that when Krett went to the other garages to wash cars he was allowed the use of a tractor to get him there, by first getting permission from Horst; that Krett's work was done at night; that when he went on duty he washed whatever had to be done at 700 South Desplaines street and then went to the other stations or garages that required cars to be washed; that if he took out a tractor when he was going to another garage to do work it was his duty to bring the tractor back to the main garage; that on the night of the accident Krett was working for defendant; that he was the oldest washer in point of service in defendant's employ, "and that sort of gave him authority to look over things," but it did not give him authority to take a truck out without the knowledge or permission of Horst or defendant. Horst, upon cross-examination, testified that it was Krett's custom to go out to different garages at different times to do work as a washer for defendant; that he had to get permission to use any equipment; that when Krett had to go to other garages of defendant to do work he would use a tractor or truck to get to the place. The following then occurred: "Q. And when he had to go from the main garage to some other garage to wash equipment, he used some one of your equipment to go there in, didn't he? A. That is true. Q. He had a set schedule on different nights when he had to go to certain other garages to wash cars, didn't he? A. That is true. Q. And those nights were Fridays, Mondays and Wednesdays, weren't they? A. That is right. Q. And this was Friday night, wasn't it? That is, it was just after, past midnight of Friday night? A. That is true. Q. That was one of the nights that was on his schedule to go to other garages to wash cars, wasn't it? A. That is true. * * * Q. And you knew he had to go, that was one of his nights to go from the main garage over to Rockwell, to wash cars, didn't you? A. Yes. * * * Q. And you knew that if he went out there he would

question, and that the first time he heard that Krett had used defendant's tractor on the early morning of September 11, 1927, was shortly after the accident. Upon cross-examination the witness testified that Krett washed cars at the main garage and at other garages of defendant; that one of the other garages was located at 16th and Roswell streets, and that when Krett went to the other garages to wash cars he was allowed the use of a tractor to get him there, by first getting permission from Horst; that Krett's work was done at night; that when he went on duty he washed whatever had to be done at 700 South Desplaines street and then went to the other stations or garages that required cars to be washed; that if he took out a tractor when he was going to another garage to do work it was his duty to bring the tractor back to the main garage; that on the night of the accident Krett was working for defendant; that he was the oldest washer in point of service in defendant's employ; "and that sure of have his authority to look over things"; but it did not give him authority to take a truck out without the knowledge or permission of Horst or defendant. Horst, upon cross-examination, testified that it was Krett's custom to go out to different garages at different times to do work as a washer for defendant; that he had to get permission to use any equipment; that when Krett had to go to other garages or defendant to do work he would use a tractor or truck to get to the place. The following then occurred: "Q. And when he had to go from the main garage to some other garage to wash equipment, he used some one of your equipment to go there in, didn't he? A. That is true. Q. He had a set schedule on different nights when he had to go to certain other garages to wash cars, didn't he? A. That is true. Q. And these nights were Friday, Monday and Wednesday, weren't they? A. That is right. Q. And this was Friday night, wasn't it? That is, it was just after, past midnight of Friday night? A. That is true. Q. That was one of the nights that was his schedule to go to other garages to wash cars, wasn't it? A. That is true. * * * Q. And you knew he had to go, that was one of his nights to go from the main garage over to Roosevelt, to wash cars, didn't you? A. Yes. * * * Q. And you knew that if he went out there he would

be expected to go out there in one of the company trucks, didn't you? A. That is true. * * * Q. Well, he had general authority to look over things, didn't he? A. Washing. Q. Well, I, anything incidental to the washing of different jobs, is that correct? A. That is correct. Q. And that would mean any washing anywhere in your different garages, wouldn't it? A. Yes. * * * Q. And didn't you make the statement at the Coroner's inquest - well, wasn't this question put to you and didn't you make this answer: 'Q. Is there any boss on that work there?' And didn't you make this answer - I am referring now to this garage that you are talking about: 'Is there any boss on that work there?' And didn't you make this answer: 'He,' - referring to Mr. Krett - 'was the oldest man there, so that kind of gave him authority to look over things.' Didn't you make that answer? A. That is true. * * * Q. * * * then this was the night - so we get this straight - this was a night when he was supposed, when he got through with his work at your main garage - is that what you call the main garage? A. That is right. Q. - at this your garage, he was supposed to go over to Rockwell - to the Ryerson garage and wash whatever there was there to be done, wasn't he? A. That is true. Q. And if he used a tractor to go on that purpose, he was following the instructions of the company, wasn't he? A. Well, in certain ways, yes."

After a careful study of the entire evidence of the witnesses Anderson and Horst, we have reached the conclusion that there was testimony given by these witnesses that fairly tends to prove that Krett at the time of the accident was acting within the scope of his authority as a servant and employee of defendant. Indeed, the able counsel for defendant, to sustain their contention that the court did not err in directing a verdict for defendant, are obliged, in their argument, to rely upon portions of the evidence of the two witnesses that is most favorable to defendant. But it is our duty, in passing upon the action of the court in directing a verdict, to consider "only that evidence * * * which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, to-

be expected to go out there in one of the company trucks, didn't you? A. That is true. * * * Q. Well, he had general authority to look over things, didn't he? A. Yeah. Q. Well, I, anything incidental to the washing or different jobs, is that correct? A. That is correct. Q. And that would mean any washing anywhere in your different garages, wouldn't it? A. Yes. * * * Q. And didn't you make the statement at the Coroner's inquest - well, wasn't this question put to you and didn't you make this answer: 'Q. Is there any boss on that work there?' And didn't you make this answer - I am referring now to this garage that you are talking about: 'Is there any boss on that work there?' And didn't you make this answer: 'He,' - referring to Mr. Kreft - 'was the oldest man there, so that kind of put him naturally in charge.' Didn't you make that answer? A. That is true. * * * Q. * * * Then this was the night - so we get this straight - this was a night when he was supposed, when he got through with his work at your main garage - is that what you call the main garage? A. That is right. Q. - at this your garage, he was supposed to go over to Cockrell - to the Fyrotron garage and wash whatever there was there to be done, wasn't he? A. That is true. Q. And if he used a tractor to go on that purpose, he was following the instructions of the company, wasn't he? A. Well, in certain ways, yes."

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gether with all legitimate inferences which may be drawn from it in his favor." (Shannon v. Nightingale, supra.)

Testing the evidence in the light of the law bearing upon the question to be determined by the trial court upon the motion to direct a verdict, we find the following: (a) That Krett was the oldest washer, in point of service, in defendant's employ, "and that sort of gave him authority to look over things;" (b) that he had general authority over anything incidental to the washing in all of the garages; (c) that he was allowed and expected to take defendant's tractors when he went from the main garage to other garages to wash cars; (d) that he had always used tractors of defendant in order to go from one garage to another upon defendant's business; that he did not walk or use a street car, but used defendant's equipment for the purpose of going from one garage to another; (e) that his work kept him out frequently after midnight; that he was expected to continue his work of washing in the different garages until it was finished; (f) that when he started to work at night washing cars he would start at the main garage and remain at that place until he had finished the work that was there for him to do; (g) that he would then go to other garages, including the one at 16th and Rockwell, and when he went to other garages it was his duty, after the work was done, to bring the tractor back to the main garage; (h) that he was working for defendant on the night of the accident; (i) that he had a set schedule to go to certain garages of defendant on certain nights to wash cars, viz., Fridays, Mondays and Wednesdays, and that the accident occurred just after midnight Friday night; (j) that Horst knew that Friday night was one of the nights that Krett had to go from the main garage to the Rockwell garage to wash cars and that if he went to that garage he would be expected to go there in one of defendant's tractors. It is ~~[illegible]~~ clear from the testimony of Horst that had Krett, on that Friday night, asked Horst for permission to use the tractor to go to the garage at 16th and Rockwell streets, it would have been granted him, and the jury, after considering certain parts of Anderson's

gether with all legitimate inferences which may be drawn from it in his favor." (Sampson v. Underwood, supra.)

Testing the evidence in the light of the law bearing upon the question to be determined by the trial court upon the motion to direct a verdict, we find the following: (a) That Hrett was the oldest waiter, in point of service, in defendant's employ, "and that sort of gave him authority to look over things;" (b) that he had general authority over anything incidental to the washing in all of the garages; (c) that he was allowed and expected to take defendant's tractors when he went from the main garage to other garages to wash cars; (d) that he had always used tractors of defendant in order to go from one garage to another upon defendant's business; that he did not walk or use a street car, but used defendant's equipment for the purpose of going from one garage to another; (e) that his work kept him out frequently after midnight; that he was expected to continue his work of washing in the different garages until it was finished; (f) that when he started to work at night washing cars he would start at the main garage and remain at that place until he had finished the work that was there for him to do; (g) that he would then go to other garages, including the one at 16th and Rockwell, and when he went to other garages in his duty, after the work was done, to bring the tractor back to the main garage; (h) that he was working for defendant on the night of the accident; (i) that he had a set schedule to go to certain garages of defendant on certain nights to wash cars, viz., Fridays, Mondays and Wednesdays, and that the accident occurred just after midnight Friday night; (j) that Horst knew that Friday night was one of the nights that Hrett had to go from the main garage to the Rockwell garage to wash cars and that if he went to that garage he would be expected to go there in one of defendant's tractors. It is ~~xxxxxxxxxx~~ clear from the testimony of Horst that had Hrett, on that Friday night, asked Horst for permission to use the tractor to go to the garage at 16th and Rockwell streets, it would have been granted him, and the jury, after considering certain parts of testimony,

testimony, might have given little weight to the latter's statement that no consent had been given to use the tractor upon the particular occasion. Indeed, it is significant that defendant's able counsel did not attempt to prove by Horst that Krett had never before that Friday night taken out a tractor without permission. From aught that appears in the testimony of Horst, Krett, to the knowledge of Horst, may have often failed to observe the rule. Moreover, the mere fact, alone, that Krett did not obtain permission to use the tractor upon the night in question would not absolve defendant from responsibility for the accident, provided the jury found from the evidence that Krett at the time of the accident was engaged in the performance of his usual duties as a servant of defendant - duties that defendant required him to perform. Especially is this true when it is clear, as has been heretofore stated, that had Krett asked for permission it would have been granted him. We are satisfied that the trial court, in directing a verdict in favor of The Willett Company, defendant, erred, and that plaintiff was thereby denied the right of a trial by jury.

We have carefully considered two cases cited by defendant in support of its contention that the action of the court in directing a verdict should be sustained. Both cases are distinguishable from the instant one upon the facts. In the case of Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, the court held that the possession of the car by the alleged servant was without the owner's permission and was the unlawful possession of a wrongdoer, and that the owner of the automobile was therefore not liable for damages caused by its negligent operation. A number of facts present in the Stutz case differentiate it entirely from the facts of the instant case. In the case of Lohr v. Barkmann Cartage Co., 335 Ill. 335, the defendant's servant had been instructed to take the truck to defendant's garage, and instead of obeying the order he went upon a mission of his own and was more than four miles away and traveling in an opposite direction from the garage when the accident happened. He had been drinking and "was on a frolic of his own," and going to meet some girls, at the time of the accident.

testimony, might have given little weight to the latter's statement that no consent had been given to use the tractor upon the particular occasion. Indeed, it is significant that defendant's able counsel did not attempt to prove by Horst that Kreft had never before taken the tractor upon such a trip without permission. Even could that appears in the testimony of Horst, Kreft, to the knowledge of Horst, may have often failed to observe the rule. Moreover, the mere fact, alone, that Kreft did not obtain permission to use the tractor upon the night in question would not absolve defendant from responsibility for the accident, provided the jury found from the evidence that Kreft at the time of the accident was engaged in the performance of his usual duties as a servant of defendant - duties that defendant required him to perform. Especially is this true when it is clear, as has been before stated, that had Kreft asked for permission it would have been granted him. We are satisfied that the trial court, in directing a verdict in favor of The Willett Company, defendant, erred, and that plaintiff was thereby denied the right of a trial by jury.

We have carefully considered two cases cited by defendant in support of its contention that the action of the court in directing a verdict should be sustained. Both cases are distinguishable from the instant one upon the facts. In the case of Nelson v. Illin Chicago Factory Branch, 341 Ill. 327, the court held that the possession of the car by the alleged servant was without the owner's permission and was the unlawful possession of a wrongdoer, and that the owner of the automobile was therefore not liable for damages caused by its negligent operation. A number of facts present in the Kuntz case differentiate it entirely from the facts of the instant case. In the case of Lohr v. Tuchman Furniture Co., 317 Ill. 117, the defendant's servant had been instructed to take the truck to defendant's garage, and instead of carrying the order he went upon a mission of his own and was not more than four miles away and travelling in an opposite direction from the place where the accident happened. He had been drinking and "was on a frolic of his own," and going to meet some girls, at the time of the accident.

The judgment of the Circuit court of Cook county in favor of The Willett Company, a corporation, defendant, is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

The judgment of the district court at trial venue is favor of the Illinois Company, a corporation, defendant, is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

40383

304 Ill App Ct. 3

RUTH HORNSTROM,
Appellee,

v.

BEVERLY STATE SAVINGS BANK OF CHICAGO, a corporation,
Defendant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HOME OF REST, THE SWEDISH BAPTIST HOME FOR THE AGED-FRIDHEM,
Appellant.

304 I.A. 574

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Ruth Hornstrom, filed her complaint herein to recover $320 with interest thereon, which is on deposit with the Beverly State Savings Bank of Chicago under an account in the name of Fred Seaberg. Her claim is based on an alleged gift inter vivos of the money on deposit to Seaberg's credit, as evidenced by his delivery to her just before his death of the bank book representing said deposit. The Home of Rest, The Swedish Baptist Home for the Aged-Fridhem (hereinafter for convenience referred to as the Home), upon learning of the commencement of this action obtained leave to intervene.

Its intervening petition alleged that "on the 10th day of September, A. D. 1934, Frederick Julius Seaberg, now deceased, executed a declaration and assignment to the intervening petitioner wherein and whereby he assigned, set over, transferred and conveyed unto the intervening petitioner all of his property, both real and personal, of every kind and description, wherever situated, which he then owned or which he might thereafter become entitled to;" that this document, which was executed under seal and attached to and made a part of the petition, is as follows:

"I, Frederick Julius Seaberg, in consideration of my admission

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Its intervening petition alleged that "on the 10th day of September, A. D. 1934, Frederick Julius Seaberg, now deceased, executed a declaration and assignment to the intervening petitioner wherein and whereby he assigned, set over, transferred and conveyed unto the intervening petitioner all of his property, both real and personal, of every kind and description, wherever situated, which he then owned or which he might thereafter become entitled to;" that this document, which was acknowledged under seal and attached to and made a part of the petition, is as follows:

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Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 574

into the Home of Rest, the Swedish Baptist Home for the Aged, Fridhem, Chicago, Illinois, hereby assign, set over, transfer and convey unto the said Home of Rest all my property, both real and personal, of every kind and description, and where ever situated, which I now own or to which I may hereafter become entitled, including any inheritance, bequest, annuity, pension, income, right or benefit, and I further agree and covenant to promptly furnish the said Home of Rest with full information in relation to any such property or rights; and also to execute and deliver to the said Home of Rest any further transfers, conveyances or assurances which may be required or requested of me for the purpose of carrying this agreement and the provisions thereof into effect, and I further declare and state that the information given in the within application is full, true and complete.

"I further agree that in consideration of my admission to the said Home of Rest I will at all times faithfully observe, and abide by, all the rules and regulations of the said Home of Rest in every particular, as they are now in force or may hereafter be changed, altered or amended, and I hereby expressly agree that said rules and regulations of said Home of Rest shall be and remain a part of this agreement."

The petition further alleged that a copy of said declaration and assignment was served upon the Beverly State Savings Bank, and a demand made by the intervening petitioner upon said bank for the $320 "in the account of Fred Seaberg on Pass Book No. 12170;" that "upon the institution of these proceedings, the said Beverly State Savings Bank advised the intervening petitioner that said suit had been filed;" that "Fred Seaberg, to whom Pass Book No. 12170 was issued by the Beverly State Savings Bank, is the same Frederick Julius Seaberg who executed the aforesaid declaration;" and that "the funds in the said Beverly State Savings Bank in the account of the said Fred Seaberg *** are, by reason of the aforesaid assignment, the property of the intervening petitioner, said assignment having been made to the intervening petitioner by the aforesaid decedent, prior to the alleged gift purported to have been made by the said Fred Seaberg to the plaintiff on July 15, 1936." The petition concluded with the prayer "that the court find that the $320 in the account of Fred Seaberg at the Beverly State Savings Bank is properly the money of this intervening petitioner and that the bank be directed to pay said money on deposit to the intervening petitioner."

Defendant bank filed an affidavit of merits asking the court to determine the true and lawful owner of the money on deposit in

into the Home of Rest, the Swedish Baptist Home for the Aged, Pridiana, Chicago, Illinois, hereby assign, set over, transfer and convey unto the said Home of Rest all my property, both real and personal, of every kind and description, and above over situated, which I now own or to which I may hereafter become entitled, including any inheritance, bequest, annuity, pension, income, right or benefit, and I further agree and covenant to properly furnish the said Home of Rest with full information in relation to any such property or rights, and also to execute and deliver to the said Home of Rest any further transfers, conveyances or assurances which may be required or requested of me for the purpose of carrying this agreement and the provisions thereof into effect, and I further declare and state that the information given in the within application is full, true and complete.

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The petition further alleged that a copy of said declaration and assignment was served upon the Beverly State Savings Bank, and a demand made by the intervening petitioner upon said bank for the $320 "in the account of Fred Seeberg on Pass Book No. 12170;" that "upon the institution of these proceedings, the said Beverly State Savings Bank advised the intervening petitioner that said suit had been filed;" that "Fred Seeberg, to whom Pass Book No. 12170 was issued by the Beverly State Savings Bank, is the same Frederick Julius Seeberg who executed the aforesaid declaration;" and that "the funds in the said Beverly State Savings Bank in the account of the said Fred Seeberg are, by reason of the aforesaid assignment, the property of the intervening petitioner, said assignment having been made to the intervening petitioner by the aforesaid decedent, prior to the alleged gift purported to have been made by the said Fred Seeberg to the plaintiff on July 15, 1936." The petition concluded with the prayer "that the court find that the $320 in the account of Fred Seeberg at the Beverly State Savings Bank is properly the money of this intervening petitioner and that the bank be directed to pay said money on deposit to the intervening petitioner."

Defendant bank filed an affidavit of merits asking the court to determine the true and lawful owner of the money on deposit in

Seaberg's account. The controversy here is, therefore, between the plaintiff and the intervening petitioner, the bank merely occupying the position of stakeholder. After finding the issues in favor of plaintiff, the court rendered judgment on such finding in favor of plaintiff and against defendant bank for $330.51 and included in the judgment an order against the intervening petitioner for costs. This appeal is brought by the intervening petitioner to reverse said judgment.

It appeared that on September 10, 1934, Frederick Julius Seaberg, who was born in Stockholm, Sweden, and was then seventy-four years old, made written application for admission to the Home. His application stated that he was a widower and had no relatives and that $500, which he had on deposit in the Mid-City National Bank, and a $15 watch constituted his sole possessions. As a part of said application he made the written assignment heretofore set forth. Following the required investigation and examination, Seaberg was admitted to the Home by action of its Board of Directors in October, 1934, where he remained until the time of his death, August 17, 1935. He delivered the $500 that he had in the Mid-City National Bank to the Home, which in turn furnished him with a room, clothing, food and medical care during his lifetime and upon his death paid his funeral expenses. On July 5, 1935, Seaberg opened a savings account at the Beverly State Savings Bank and deposited therein $320. About three days before he went to the hospital on the occasion of his last illness, he gave the bank book, which he had received from the bank at the time he opened the account, to Ruth Hornstrom, the plaintiff. When he gave her the book Seaberg said: "Ruth, I want you to have this little money. You have been so kind to me, and I am going to the hospital." The bank book was in an envelope containing the following penciled notations made by Seaberg: "Bank Book No. 12170 Fred Seaberg 11396 S. Erving Ave. For Ruth." After plaintiff received the bank book from the decedent, she put it away and nothing was done about it until she met Mr. Miller,

Seeberg's account. The controversy here is, therefore, between the plaintiff and the intervening petitioner, the bank merely asserting the position of stakeholder. After finding the issues in favor of plaintiff, the court rendered judgment on such finding in favor of plaintiff and against defendant bank for $320.51 and included in the judgment an order against the intervening petitioner for costs. This appeal is brought by the intervening petitioner to reverse said judgment.

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one of her attorneys in this case, about two years later. She instituted this action October 23, 1937.

The intervenor's theory is stated in its brief as follows: "The intervening petitioner believes that the assignment by Seaberg contained in his application for admission was a valid transfer to the Home of the money in controversy for a sufficient consideration. Since this assignment took effect as soon as the property came into being, its legal result was to vest title to the money in the intervening petitioner prior to the time of the gift to the plaintiff. Being prior in time the intervenor's claim is prior in right."

It is conceded that the delivery of the bank book by Seaberg to plaintiff, coupled with his oral and written expressions of intention, would ordinarily constitute a valid gift inter vivos and vest plaintiff with legal title to the bank deposit, but the intervenor contends that as against the prior assignment to the Home for a valuable consideration of the fund in question, the attempted gift of the money on deposit to plaintiff is unenforceable and that as soon as said fund came into existence, title to it vested in the Home. Thus the question presented for our determination is the legal effect of the assignment by Seaberg to the Home in the light of the subsequent gift of the money on deposit in the bank to plaintiff.

Seaberg, while not destitute in the strict sense, represented to the Home when he applied for admission thereto that he had only $500. While he was seventy-four years old, he was apparently in good health and could expect to live for sometime. As heretofore stated, he had no relatives and wanted to be admitted to the Home so that he could spend the rest of his life in comparative comfort and enjoy the companionship of people of his own age and upon his death be assured proper burial. At the time of his admission to the institution he evinced his willingness to turn over to it all the money and property which he then had or which he might later acquire or become possessed of in consideration of his said admission. He was given and accepted the benefits of the Home until his demise. It does not appear whether

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"The intervening petitioner believes that the assignment by Seeberg contained in his application for admission was a valid transfer to the Home of the money in controversy for a sufficient consideration. Since this assignment took effect as soon as the property came into being, its legal result was to vest title to the money in the intervening petitioner prior to the time of the gift to the plaintiff. Being prior in time the intervenor's claim is prior in right."

It is conceded that the delivery of the bank book by Seeberg to plaintiff, coupled with his oral and written expressions of intention, would ordinarily constitute a valid gift inter vivos and vest plaintiff with legal title to the bank deposit, but the intervenor contends that as against the prior assignment to the Home for a valuable consideration of the fund in question, the attempted gift of the money on deposit to plaintiff is unenforceable and that as soon as said fund came into existence, title to it vested in the Home. Thus the question presented for our determination is the legal effect of the assignment by Seeberg to the Home in the light of the subsequent gift of the money on deposit in the bank to plaintiff.

Seeberg, while not destitute in the strict sense, represented to the Home when he applied for admission thereto that he had only $300. While he was seventy-four years old, he was apparently in good health and could expect to live for somewhat. He moreover stated, he had no relatives and wanted to be admitted to the Home so that he could spend the rest of his life in comparative comfort and enjoy the companionship of people of his own age and upon his death be assured proper burial. At the time of his admission to the institution he evinced his willingness to turn over to it all the money and property which he then had or which he might later acquire or become possessed of in consideration of his said admission. He was given and accepted the benefits of the Home until his demise. It does not appear whether

Seaberg had the $320, which he later deposited in the bank, in his possession at the time he executed the assignment to the home, nor does it appear when he acquired this money. It does appear, however, that it came into existence in so far as the issues in this case are concerned when he deposited it in the bank on July 5, 1935, and that he did not turn over his bank book to plaintiff until about July 15, 1935.

Inasmuch as the assignment by Seaberg to the Home was given for a valuable consideration, we think it should be upheld and enforced as against his later attempted gift of this money subsequently acquired by him. There is no question but that under Seaberg's assignment to the Home of all property which he might thereafter acquire, a court of equity would recognize and enforce the right of the institution to the bank deposit in question. The law is now well settled in this state that assignments of contingent interests, expectancies and things which have no present actual or potential existence but rest in possibility only, if made bona fide and for an adequate consideration, will be enforced in equity. As to things not in being, the assignment operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse. (Crum v. Sawyer, 132 Ill. 443.)

But plaintiff argues that even though the instrument relied upon by the intervening petitioner embraces all the essentials of a valid equitable assignment, it could only be enforced in a court of equity and that since the Municipal court of Chicago is not a court of general equitable jurisdiction, a judge of that court lacked authority to grant the intervenor the relief sought. In so far as the record discloses plaintiff did not question the right of the trial court to determine the claim of the intervening petitioner on the ground that such claim could be enforced only by a court of equity. The objection that the claim of the Home is only cognizable in equity, not having been raised in the trial court, cannot be raised here for the first time. (Reed v. Engel, 142 Ill. App. 413.) The issues were submitted on the pleadings heretofore set forth without objection and the right of a judge of the Municipal court to apply equitable principles in determining the issues presented

Saeberg had the $920, which he later deposited in the bank, in his possession at the time he executed the assignment to the Home, nor does it appear when he acquired this money. It does appear, however, that it came into existence in so far as the issues in this case are concerned when he deposited it in the bank on July 3, 1933, and that he did not turn over his bank book to plaintiff until about July 15, 1933.

Inasmuch as the assignment by Saeberg to the Home was given for a valuable consideration, we think it should be upheld and enforced as against his later attempted gift of this money subsequently acquired by him. There is no question but that under Saeberg's assignment to the Home of all property which he might thereafter acquire, a court of equity would recognize and enforce the right of the institution to the bank deposit in question. The law is now well settled in this state that assignments of contingent interests, expectancies and things which have no present actual or potential existence but rest in possibility only, if made bona fide and for an adequate consideration, will be enforced in equity. As to things not in being, the assignment operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse. (Ottum v. Sawyer, 132 Ill. 443.)

But plaintiff argues that even though the instrument relied upon by the intervening petitioner embraces all the essentials of a valid equitable assignment, it could only be enforced in a court of equity and that since the Municipal court of Chicago is not a court of general equitable jurisdiction, a judge of that court lacked authority to grant the intervenor the relief sought. In so far as the record discloses plaintiff did not question the right of the trial court to determine the claim of the intervening petitioner on the ground that such claim could be enforced only by a court of equity. The objection that the claim of the Home is only cognizable in equity, not having been raised in the trial court, cannot be raised here for the first time. (Ward v. Ward, 142 Ill. 494, 497.) The issues were submitted on the pleadings interposed without objection and the right of a judge of the municipal court to apply equitable principles in determining the issues presented

in an action at law has long been recognized. We think, however, that the judgment rendered in this case is erroneous because the trial judge failed to recognize the principles properly applicable to the issues. In our opinion the right of the Home to the money deposited by Seaberg in the bank on July 5, 1935, is superior to any right plaintiff may claim to have to said money by reason of Seaberg's attempted gift to her on or about July 15, 1935. The intervenor's superior right to the fund was clearly established by the evidence.

Other points are urged but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of the intervening petitioner and against the defendant, Beverly State Savings Bank of Chicago, for $330.51 and judgment is also entered here in favor of the intervening petitioner and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF INTERVENING PETITIONER
AND AGAINST DEFENDANT FOR $330.51
AND IN FAVOR OF INTERVENING PETITIONER
AND AGAINST PLAINTIFF FOR COSTS.

Friend and Scanlan, JJ., concur.

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Other points are urged but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the municipal court of Chicago is reversed and judgment is entered here in favor of the intervening petitioner and against the defendant, Beverly State Savings Bank of Chicago, for $330.71 and judgment is also entered here in favor of the intervening petitioner and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR OF INTERVENING PETITIONER AND AGAINST DEFENDANT FOR $330.71 AND IN FAVOR OF INTERVENING PETITIONER AND AGAINST PLAINTIFF FOR COSTS.

Friend and Scanlan, JJ., concur.

304 Ill. App.

40413

JAMES R. CARDWELL,
Appellant,

v.

SAM FELDMAN, doing business as Del Ruth Hat Company,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 574

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, James R. Cardwell, from an order entered April 5, 1938, which vacated a judgment entered February 11, 1938.

On August 13, 1937, plaintiff obtained a judgment by confession against defendant, Sam Feldman, for $208.75 and costs for rent and attorney's fees under a lease between plaintiff, as lessor, and defendant, as lessee, demising certain premises in the building at 159 North Wabash avenue, Chicago.

On September 8, 1937, in response to a petition and a demand for a trial by jury by defendant, an order was entered opening the judgment by confession, permitting defendant to defend the action, directing that the petition filed by defendant stand as his affidavit of defense and placing the cause on the September jury calendar. February 11, 1938, after an ex parte hearing, judgment was entered against defendant upon the verdict of a jury confirming the judgment by confession for $208.75.

On April 5, 1938, more than seven weeks later, defendant filed a verified petition to vacate such judgment. In this petition Louis I. Schubert, one of the attorneys for defendant, states that "he appeared in Room 915, Municipal Court of Chicago, on or about December 16, 1937, when the jury calendar was called and answered ready for trial in the above entitled cause and was then and there advised by the Clerk of the Court that the case would be reached for trial in about six weeks, in either Room 1112 or Room 1114, City Hall, being

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, James R. Cardwell, from an order entered April 1, 1938, which vacated a judgment entered February 11, 1938.

On August 13, 1937, plaintiff obtained a judgment by confession against defendant, Ben Fridman, for $208.75 and costs for rent and attorney's fees under a lease between plaintiff, as lessor, and defendant, as lessee, demising certain premises in the building at 159 North Wabash avenue, Chicago.

On September 8, 1937, in response to a petition and a demand for a trial by jury by defendant, an order was entered opening the judgment by confession, permitting defendant to defend the action, directing that the petition filed by defendant stand as his affidavit of defense and placing the cause on the September jury calendar. February 11, 1938, after an ex parte hearing, judgment was entered against defendant upon the verdict of a jury confirming the judgment by confession for $208.75.

On April 5, 1938, more than seven weeks later, defendant filed a verified petition to vacate such judgment. In this petition Louis I. Schubert, one of the attorneys for defendant, states that "he appeared in Room 919, Municipal Court of Chicago, on or about December 16, 1937, when the jury calendar was called and answered ready for trial in the above entitled cause and was then and there advised by the Clerk of the Court that the case would be reached for trial in about six weeks, in either Room 1112 or Room 1114, City Hall, being

rooms occupied by regular judges of the Municipal Court of Chicago;" that "since said date he has diligently and carefully watched the Municipal Court record for all cases assigned to Rooms 1112 and 1114, and did not find the above entitled cause as one of the cases set for trial in either of the said court rooms;" that "he was today informed by the defendant that execution was served upon him in the above entitled cause, and your petitioner immediately made an examination of the records of court and found that the said case appeared on the trial calendar in room 1123 instead of 1112 or 1114, on January 12, 1938, and that the said cause was then continued to February 11, 1938, and that this petitioner had no means of determining from the Municipal Court Record, which he examined daily, of the fact that the said case was on the trial calendar in Room 1123;" that "he relied on the information that he received from the Clerk of the Municipal Court of Chicago who was in charge of the call in Room 915 when the said case was called on the regular jury calendar and that he did not know and had no means of ascertaining that any change was made with reference to the assignment of the said case to a room other than Rooms 1112 or 1114;"and that "he knows of his own knowledge that the defendant has a good and meritorious defense to the whole of the plaintiff's claim."

Plaintiff filed a counter affidavit by James S. Shannon, an attorney in the employ of the attorneys for plaintiff, which averred "that he appeared in Room 915 City Hall, Chicago, on December 16, 1937, when the above entitled cause was called on the preliminary call of the jury calendar of the Municipal Court of Chicago, and that he answered that plaintiff was ready for trial in the above entitled cause; that the Clerk of the court did not then and there inform counsel in said cause that said cause would be tried in either Room 1112 or Room 1114 City Hall, but on the contrary announced that all cases on the jury calendar would be tried in Room 1123 City Hall, Chicago."

Plaintiff also filed a counter affidavit by Wallace R. Sollo, which stated that on four occasions prior to December 16, 1937, a notice appeared in the Daily Municipal Court record that all cases on the

rooms occupied by regular judges of the Municipal Court of Chicago;"
that "since said date he has diligently and carefully watched the
Municipal Court record for all cases assigned to Rooms 1112 and 1114,
and did not find the above entitled cause as one of the cases set for
trial in either of the said court rooms;" that "he was today informed
by the informant that association was served upon him in the above
entitled cause, and your petitioner immediately made an examination of
the records of court and found that the said case appeared on the trial
calendar in room 1123 instead of 1112 or 1114, on January 12, 1938, and
that the said cause was then continued to February 11, 1938, and that
this petitioner had no means of determining from the Municipal Court
Record, which he examined daily, of the fact that the said case was on
the trial calendar in Room 1123;" that "he relied on the information
that he received from the Clerk of the Municipal Court of Chicago who
was in charge of the call in Room 918 when the said case was called on
the regular jury calendar and that he did not know and had no means
of ascertaining that any change was made with reference to the assign-
ment of the said case to a room other than Rooms 1112 or 1114;" and
that "he knows of his own knowledge that the defendant has a good and
meritorious defense to the whole of the plaintiff's claim."

Plaintiff filed a counter affidavit by James S. Shannon, an
attorney in the employ of the attorneys for plaintiff, which averred
"that he appeared in Room 918 City Hall, Chicago, on December 16, 1937,
when the above entitled cause was called on the preliminary call of
the jury calendar of the Municipal Court of Chicago, and that he
answered that plaintiff was ready for trial in the above entitled
cause; that the Clerk of the court did not then and there inform counsel
in said cause that said cause would be tried in either Room 1112 or Room
1114 City Hall, but on the contrary announced that all cases on the jury
calendar would be tried in Room 1123 City Hall, Chicago."

Plaintiff also filed a counter affidavit by William R. Bolle,
which stated that on four occasions prior to December 16, 1937, a notice
appeared in the Daily Municipal Court record that all cases on the

August, September and October jury calendars involving amounts of $200 or more would be called in Room 915, City Hall, and if ready for trial would be placed upon the calendar in Room 1123, City Hall, and set for trial commencing January 3, 1938; that on December 16, 1937, pursuant to said notice, this case was called in the court room of the Chief Justice of the Municipal court of Chicago; that counsel for both plaintiff and defendant were present and responded that they were ready for trial and this cause was ordered placed upon the calendar of cases to be tried in Room 1123, commencing January 3, 1938; that on December 17, 1937, the day after this case was called in Room 915, a minute of the order placing it on the calendar in Room 1123 appeared in the Daily Municipal Court Record in the usual place for such minutes; that notice also appeared in the Daily Municipal Court Record on December 16, 17, 20, 21 and 22, 1937, that the August, September and October, 1937, jury cases would be called in Room 915 and set for trial in Room 1123; that on January 7, January 10, and January 11, 1937, under the heading of "Calendar of Tomorrow's Court Calls," there appeared in the Daily Municipal Court Record the trial calls in Room 1123; that these calls were listed in two groups; that one group bore the heading, "First Block - Cases Subject to Trial," and the second group bore the heading "Second Block;" that on January 7 and January 10 this case appeared in the Second Block of cases and on January 11 this case appeared under the block of cases subject to trial; that on January 12, 1938, this case was called for trial and plaintiff responded and informed the court that he was ready to proceed to trial; that by reason of the failure of the defendant to appear at this call the court on its own motion continued the trial of the cause to February 11, 1938; that a minute of this order was at that time entered upon the half sheet of the court files in this case; that on January 13, 1938, there appeared in the Daily Municipal Court Record a minute of the order postponing this case to February 11, 1938; that on February 10, 1938, there appeared in the Daily Municipal Court Record under the heading "Calendar of Tomorrow's Calls" a list of cases to be tried on February

August, September and October jury calendars involving amounts of $500 or more would be called in Room 915, City Hall, and if ready for trial would be placed upon the calendar in Room 1123, City Hall, and set for trial commencing January 3, 1938; that on December 16, 1937, pursuant to said notice, this case was called in the court room of the Chief Justice of the Municipal court of Chicago; that counsel for both plaintiff and defendant were present and responded that they were ready for trial and this cause was ordered placed upon the calendar of cases to be tried in Room 1123, commencing January 3, 1938; that on December 17, 1937, the day after this case was called in Room 915, a minute of the order placing it on the calendar in Room 1123 appeared in the Daily Municipal Court Record in the usual place for such minutes; that notice also appeared in the Daily Municipal Court Record on December 16, 17, 20, 21 and 22, 1937, that the August, September and October, 1937, jury cases would be called in Room 915 and set for trial in Room 1123; that on January 7, January 10, and January 11, 1937, under the heading of "Calendar of Tomorrow's Court Calls," there appeared in the Daily Municipal Court Record the trial calls in Room 1123; that these calls were listed in two groups; that one group bore the heading, "First Block - Cases Subject to Trial," and the second group bore the heading "Second Block;" that on January 7 and January 10 this case appeared in the Second Block of cases and on January 11 this case appeared under the block of cases subject to trial; that on January 12, 1938, this case was called for trial and plaintiff responded and informed the court that he was ready to proceed to trial; that by reason of the failure of the defendant to appear at this call the court on its own motion continued the trial of the cause to February 11, 1938; that a minute of this order was at that time entered upon the half sheet of the court files in this case; that on January 13, 1938, there appeared in the Daily Municipal Court Record a minute of the order postponing this case to February 11, 1938; that on February 10, 1938, there appeared in the Daily Municipal Court Record under the heading "Calendar of Tomorrow's Calls" a list of cases to be tried on February

11 in room 1123; that this case appeared under the block of cases subject to trial; that on February 11, 1938, this cause was called for trial by the court in room 1123; that plaintiff responded that he was ready for trial; that defendant did not appear; that a jury was impaneled and plaintiff introduced evidence before the jury in support of his claim; that the jury returned a verdict in favor of plaintiff and pursuant to the verdict judgment was entered confirming the judgment theretofore entered by confession; and that there appeared in each publication of the Daily Municipal Court Record from January 3, 1938, to and including April 4, 1938, a calendar of the cases to be tried in room 1123, City Hall, and that each publication contained the heading: "Room 1123 City Hall Judge Bonelli 9:30 A. M. jury Trials * * * August, September and October Calendars."

The only question presented is whether defendant in its petition made a sufficient showing to warrant the vacation of the judgment by the trial court. In his brief plaintiff contends that defendant was not entitled to have the judgment set aside for the following reasons: "A. The record shows that the attorneys for defendant were negligent. B. The preponderance of the evidence is that the attorneys for defendant were not misinformed by the court clerk. C. The court should not vacate a judgment after thirty days upon the uncorroborated statement of defendant's attorney that he had been misinformed by the clerk as to the court room in which the case would be tried."

Defendant's theory is that "the attorneys for the defendant were not negligent and the failure to appear was due to the confusion which prevailed in the Municipal court of Chicago, and through no fault of the defendant;" and that "the court as a matter of principle properly opened up the judgment in order to give the parties the opportunity to try the case on the merits and have their day in court."

Stating his reasons for vacating the judgment, the trial judge who had been assigned to the jury trial calendar in Room 1123 continuously since January 3, 1938, and who entered the ex parte judgment on February 11, 1939, said in part:

11 in room 1123; that this case appeared under the block of cases subject to trial; that on February 11, 1938, this cause was called for trial by the court in room 1123; that plaintiff responded that he was ready for trial; that defendant did not appear; that a jury was impaneled and plaintiff introduced evidence before the jury in support of his claim; that the jury returned a verdict in favor of plaintiff and pursuant to the verdict judgment was entered confirming the judgment theretofore entered by confession; and that there appeared in each publication of the Daily Municipal Court Record from January 3, 1938, to and including April 4, 1938, a calendar of the cases to be tried in room 1123, City Hall, and that each publication contained the heading: "Room 1123 City Hall Judge Arnolli Jr. W. Jury Trials * * * August, September and October Calendars."

The only question presented is whether defendant in its petition made a sufficient showing to warrant the vacation of the judgment by the trial court. In his brief plaintiff contends that defendant was not entitled to have the judgment set aside for the following reasons: "A. The record shows that the attorneys for defendant were negligent. B. The preponderance of the evidence is that the attorneys for defendant were not misinformed by the court clerk. C. The court should not vacate a judgment after ninety days upon the uncorroborated statement of defendant's attorney that he had been misinformed by the clerk as to the court room in which the case would be tried."

Defendant's theory is that "the attorneys for the defendant were not negligent and the failure to appear was due to the confusion which prevailed in the Municipal court of Chicago, and through no fault of the defendant;" and that "the court as a matter of practice properly opened up the judgment in order to give the parties the opportunity to try the case on the merits and have their day in court."

Stating his reasons for vacating the judgment, the trial judge who had been assigned to the jury trial calendar in room 1123 contemporaneously since January 1, 1938, and who entered the [illegible] judgment on February 11, 1938, said in part:

"Therefore I feel that every man should have his right to appear in court and defend himself, and due to the fact that there has been a mistake I am satisfied not only with this case but with quite a number of cases that were assigned from court to court, and the lawyers had no knowledge it was in my court. That was what happened in this court room, every day there were five or six, you ask any lawyer who was in this court in January and the early part of February, you will find this court notified my personal clerk to call the lawyers, and I would not listen to any ex parte hearings after that."

Ordinarily when a litigant has not had his day in court on the merits of a cause and his case has been dismissed or a judgment has been rendered against him in his absence, we are disposed to afford him a hearing on the merits if it can be done with any degree of propriety. In this case, however, we can find no justification in the record for the order of the trial court which vacated the judgment of February 11, 1938. The only excuse offered by defendant's counsel for not properly following the progress of this case, as well as the principle reason advanced for the vacation of the judgment, was the alleged misinformation given to Louis I. Schubert, one of defendant's attorneys, as to the branch of the court (designated by its room number) to which the case would be assigned for trial when same was called for assignment on the preliminary trial call in the court room of the Chief Justice of the Municipal court on December 16, 1937. It will be noted that in his affidavit Schubert does not state that the clerk of the court advised him that the case had been assigned for trial to either room 1112 or 1114. He states rather that the clerk informed him "that the case would be reached for trial in about six weeks in either Room 1112 or 1114, City Hall." Is it reasonable to suppose that the clerk of the court would make a statement advising such an indefinite assignment of the case when the very purpose of the preliminary call was to definitely assign the cases thereon for trial? James S. Shannon in his counter affidavit states that the clerk did not make the statement attributed to him by Schubert, but on the contrary announced that this, as well as all the other cases on the preliminary call, which were ready for trial would be tried in room 1123, City Hall. Shannon's statement is borne out by the announcement of the preliminary call in the Daily Municipal Court Record. It was in response to that announcement that Schubert appeared

"Therefore I feel that every man should have his right to appear in court and defend himself, and due to the fact that there has been a mistake I am satisfied not only with this case but with quite a number of cases that were assigned from court to court, and the judges had no knowledge it was in my court. That was what happened in this court room, every day there were five or six, you ask any lawyer and you is this every in January and the early part of February, you will find this court notified by personal clerk to call the lawyer, and I would not listen to any excuse because after that."

Ordinarily when a litigant has not had his day in court on the merits of a cause and his case has been dismissed or a judgment has been rendered against him in his absence, we are disposed to afford him a hearing on the merits if it can be done with any degree of propriety. In this case, however, we can find no justification in the record for the order of the trial court which vacated the judgment of February 11, 1938. The only excuse offered by defendant's counsel for not properly following the progress of this case, as well as the principle reason advanced for the vacation of the judgment, was the alleged misinformation given to Louis I. Schubert, one of defendant's attorneys, as to the branch of the court (designated by its room number) to which the case would be assigned for trial when same was called for assignment on the preliminary trial call in the court room of the Chief Justice of the Municipal court on December 16, 1937. It will be noted that in his affidavit Schubert does not state that the clerk of the court advised him that the case had been assigned for trial to either room 1111 or 1114. He states rather that the clerk informed him "that the case would be reached for trial in about six weeks in either Room 1112 or 1114, City Hall." Is it reasonable to suppose that the clerk of the court would make a statement advising such an indefinite assignment of the case when the very purpose of the preliminary call was to definitely assign the cause thereon for trial? James S. Shannon in his counter affidavit states that the clerk did not make the statement attributed to him by Schubert, but on the contrary announced that this, as well as all the other cases on the preliminary call, which were ready for trial would be tried in room 1117, City Hall. Shannon's statement is borne out by the announcement of the preliminary call in the Daily Municipal Court Record. It was in response to that announcement that Schubert appeared

at the preliminary call and it is fair to assume that having so appeared, he read the announcement. Defendant's counsel knew that this case had originally been placed on the September, 1937, jury calendar. The announcement gave notice "that all CIVIL JURY CASES consisting of Contracts and Torts over $200.00 ordered to the AUGUST, SEPTEMBER and OCTOBER JURY CALENDARS will be called in Room 915 starting Wednesday, December 15th at 2 P. M. Cases which are ready for trial will be placed on the Trial Call and set for trial in Room 1123, beginning Monday, January 3, 1938." It thus appears that all of the cases on the preliminary call which involved more than $200 and which were ready for trial were to be assigned to the judge holding court in room 1123 and to no other court room. The same notice in the Daily Municipal Court Record that apprised defendant's counsel that the preliminary call would be held in room 915 also apprised said counsel that the cases which were ready for trial on said call would be assigned to room 1123 for trial. In view of the foregoing facts it is hardly conceivable that the clerk of the court could have stated that this or any other case on the preliminary call involving more than $200 was or would be assigned for trial to any court room other than room 1123. The most favorable light in which Schubert's affidavit can be viewed is that he both misread the several notices which had appeared in the Daily Municipal Court Record announcing the preliminary call of the jury calendars in question and the purpose of such call and misunderstood the announcement of the clerk on the occasion of said preliminary call on December 16, 1937, when this case was assigned to room 1123 for trial.

It would serve no useful purpose to discuss at length and analyze the facts set forth in the counter affidavit of Attorney Wallace R. Sollo. It is sufficient to state that it is shown in said affidavit that prior to the entry of the judgment on February 11, 1938, the Daily Municipal Court Record in forty-three different issues, commencing with its issue of December 10, 1937, contained an announcement or notice to the effect that this case would be or had been

at the preliminary call and it is fair to assume that having no appeared, he read the announcement. Defendant's counsel knew that this case had originally been placed on the September, 1937, jury calendar. The announcement gave notice "that all CIVIL JURY CASES remaining of Contracts and Torts even date,so assigned to the CIVIL CALENDAR and DOCKET JURY CALENDAR will be called in Room 313 starting Monday, December 13th at 2 P. M. Cases which are ready for trial will be placed on the Trial Call and set for trial in Room 1123, beginning Monday, January 3, 1938." It thus appears that all of the cases on the preliminary call which involved more than $500 and which were ready for trial were to be assigned to the judge hearing cases in room 1123 and to no other court room. The same notice in the Daily Municipal Court Record that apprised defendant's counsel that the preliminary call would be held in room 313 also apprised said counsel that the cases which were ready for trial on said call would be assigned to room 1123 for trial. In view of the foregoing fact it is hardly conceivable that the clerk of the court could have stated that this or any other case on the preliminary call involving more than $500 was or would be assigned for trial to any court room other than room 1123. The most favorable light in which defendant's attorney can be viewed is that he took already the several notices which had appeared in the Daily Municipal Court Record announcing the preliminary call of the jury calendars in question and the purpose of such call and misunderstood the announcement of the clerk on the occasion of said preliminary call on December 16, 1937, when this case was assigned to room 1123 for trial.

It would serve no useful purpose to discuss at length and analyze the facts set forth in the counter affidavit of Attorney Wallace H. Dolle. It is sufficient to state that it is shown in said affidavit that prior to the entry of the judgment on February 11, 1938, the Daily Municipal Court Record in forty-three different issues, commencing with its issue of December 10, 1937, contained an announcement or notice to the effect that this case would be or had been

assigned to room 1123 for trial. Even after the judgment was entered on February 11, 1938, and until April 5, 1938, when defendant made his motion to vacate same, there continued to appear daily in the Municipal Court Record a notice that Judge Bonelli was trying the jury cases in room 1123 from the "August, September and October calendars." It is pertinent to note that when the case was reached and called for trial on January 12, 1938, and plaintiff appeared ready for trial, the court on its own motion, because of defendant's failure to appear, continued the cause until February 11, 1939. It would seem that in view of the repeated notices which appeared in the Municipal Court Record concerning this case, if defendant's counsel had exercised even the slightest diligence, he would have been correctly informed as to the court room to which this cause had been properly assigned for trial.

More than thirty days having elapsed since the entry of the judgment, defendant's motion to vacate was made under Rule 209 of the rules of practice of the Municipal court of Chicago, which in substance is identical with a similar provision of Section 21 of the Municipal court act (Ill. Rev. Stats. 1937, chap. 37, par. 376.) Rule 209 provides, in part, as follows:

"If no motion is made to set aside or modify any final order, judgment or decree within thirty days after the entry thereof, the same shall not be vacated, set aside or modified excepting upon appeal or by a petition or motion setting forth grounds for vacating, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by a petition for equitable relief ***."

The petition to vacate a judgment filed under this rule is in the nature of an independent suit in equity and "the burden is on the one seeking to set aside the judgment to prove by a preponderance of the evidence the facts alleged in his petition or motion." People v. Green, 355 Ill. 468. In Travelers Insurance Company v. Wagner, 279 Ill. App. 13, the court said at p. 16:

"As stated in Imbrie v. Bear, 230 Ill. App. 155, 'It is well settled that relief will be barred where the applicant has been guilty of negligence and that an agent's or attorney's neglect or want of diligence is binding on the principal. (Simon v. Hengels, 107 Ill.

assigned to room 1123 for trial. Even after the judgment was entered on February 11, 1938, and until April 4, 1938, when defendant made his motion to vacate same, there continued to appear daily in the Municipal Court Record a notice that Judge Romelli was trying the jury cases in room 1123 from the "August, September and October calendars." It is pertinent to note that when the case was reached and called for trial on January 12, 1938, and plaintiff appeared ready for trial, the court on its own motion, because of defendant's failure to appear, continued the cause until February 11, 1938. It would seem that in view of the repeated notices which appeared in the municipal court record concerning this case, if defendant's counsel had exercised even the slightest diligence, he would have been correctly informed as to the court room to which this cause had been properly assigned for trial.

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The petition to vacate a judgment filed under this rule is in the nature of an independent suit in equity and "the burden is on the one seeking to set aside the judgment to prove by a preponderance of the evidence the facts alleged in his petition or motion." People v. Green, 357 Ill. 462. In Travelers Insurance Company v. Thomas, 277 Ill. App. 13, the court said at p. 16:

"As stated in Jackie v. Ebert, 230 Ill. App. 1332, 'It is well settled that relief will be barred where the applicant has been guilty of negligence and that an agent's or attorney's neglect or want of diligence is binding on the principal. (Ilsen v. Wagner, 107 Ill.

App. 174; Foster v. Weber, 110 Ill. App. 5; Eggleston v. Royal Trust Co., 205 Ill. 170; Staunton Coal Co. v. Menk, 197 Ill. 369.)'"

We are impelled to hold that there has been no showing of diligence, either on the part of defendant or his counsel and that defendant failed to prove by a preponderance of the evidence that the clerk on duty in the court room of the Chief Justice on the occasion of the preliminary call misinformed defendant's counsel as to the court room to which the case had been or would be assigned for trial.

In defendant's brief and in the statement made by the trial judge in deciding the motion to vacate, mention is made of "confusion" attendant upon assignment of this and other cases for trial. The record discloses absolutely no confusion either in connection with the assignment of the case for trial or with its progress on the trial call until it was reached for trial and tried. It appears rather that the case was properly assigned to the trial calendar and progressed in an orderly manner thereon. Judgments would stand upon a very insecure foundation if they could be set aside at any time on the mere filing of a petition regardless of the truth of its averments. (Imbrie v. Bear, 230 Ill. App. 155.) Even though the judgment in the instant case was rendered upon a verdict returned after an ex parte hearing, if the order vacating said judgment on the pretext or excuse offered here were permitted to stand, it would be to hold in effect that an ex parte judgment can have no stability under any circumstances.

Defendant also alleged in his petition to vacate and contends here that the judgment was not in conformity with the verdict and is therefore void. There is no merit in this contention. The verdict reads, "We, the jury, find for the plaintiff - with $208.75 damages," and the judgment was that the judgment by confession of August 13, 1937, for $208.75 be confirmed with costs. While the form of verdict given to and returned by the jury was inaptly phrased, it evinced the intent of the jury. Even though the judgment was not in harmony with the verdict, that question could not be raised by defendant's motion to vacate. A judgment not in harmony with the verdict upon which it

App. 174; Foster v. Weber, 116 Ill. App. 57 [illegible]; Hammond Coal Co. v. Ruth, 147 Ill. 240, 244; Ittner Co., 257 Ill. 170; Hammond Coal Co. v. Ruth, 147 Ill. 240, 244.)

We are impelled to hold that there has been no showing of diligence, either on the part of defendant or his counsel and that defendant failed to prove by a preponderance of the evidence that the clerk on duty in the court room of the Chief Justice on the occasion of the preliminary call misinformed defendant's counsel as to the court room to which the case had been or would be assigned for trial.

In defendant's brief and in the statement made by the trial judge in deciding the motion to vacate, mention is made of "confusion" attendant upon assignment of this and other cases for trial. The record discloses absolutely no confusion either in connection with the assignment of the case for trial or with its progress on the trial call until it was reached for trial and tried. It appears rather that the case was properly assigned to the trial calendar and progressed in an orderly manner thereon. Judgments would stand upon a very insecure foundation if they could be set aside at any time on the mere filing of a petition regardless of the truth of its averments. (Smith v. Esser, 230 Ill. App. 197.) Even though the judgment in the instant case was rendered upon a verdict returned after an ex parte hearing, if the order vacating said judgment on the present or excuse offered here were permitted to stand, it would be to hold in effect that an default judgment can have no stability under any circumstances.

Defendant also alleged in his petition to vacate and contends here that the judgment was not in conformity with the verdict and is therefore void. There is no merit in this contention. The verdict reads, "We, the jury, find for the plaintiff - with $208.75 damages," and the judgment was that the judgment by confession of August 13, 1937, for $208.75 be confirmed with costs. While the form of verdict given to and returned by the jury was inaptly phrased, it evinced the intent of the jury. Even though the judgment was not in harmony with the verdict, that question could not be raised by defendant's motion to vacate. A judgment not in harmony with the verdict upon which it

is based is not void but merely erroneous. (33 Corpus Juris, p. 1169.) The trial court upon defendant's petition to vacate, filed more than thirty days after the entry of the judgment, could not set aside a judgment for an error appearing on the face of the record and could not correct the error. (Chicago Faucet Company v. 839 Lake Street Building Corporation, 285 Ill. App. 151.)

Defendant's contention that the order vacating the judgment is not a final appealable order does not merit serious consideration.

For the reasons stated herein the order of the Municipal court of Chicago vacating the judgment entered February 11, 1938, is reversed.

ORDER REVERSED.

Friend and Scanlan, JJ., concur.

is based is not void but merely erroneous. (Jj Harper Bank, p. 1160.) The trial court upon defendant's petition to vacate, filed more than thirty days after the entry of the judgment, could not set aside a judgment for an error appearing on the face of the record and could not correct the error. (Chicago Title Company v. Six Lake Street Building Corporation, 385 Ill. 479, 1?1.)

Defendant's contention that the order vacating the judgment is not a final appealable order does not merit serious consideration.

For the reasons stated herein the order of the municipal court of Chicago vacating the judgment entered February 11, 1?7?, is reversed.

Order reversed.

Friend and Lorenzen, JJ., concur.

40852

ISADOR BECKER, Appellee, v. LOEBS INSURANCE AGENCY COMPANY, a corporation, Appellant. MOSES BAUM (third party), Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 575

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In this action plaintiff, Isador Becker, filed the following statement of claim:

"Plaintiff alleges that he is a duly licensed and practicing attorney and that his claim is for professional services rendered the defendant in connection with the claim of Brunswick Radio Corporation against said defendant.

"That the defendant promised and agreed to pay a sum equal to 5% of the amount saved to the defendant; that the amount saved to the defendant was $944.33; that 5% of said sum is in the amount of $472.17; that defendant has paid the sum of $50.00 on account of said amount due plaintiff and that there remains an unpaid balance of $422.17.

"WHEREFORE, plaintiff prays that judgment be entered in his favor, against the defendant, for the sum of $422.17."

He also filed a bill of particulars as follows:

"1. Contract alleged in Statement of Claim was oral and was entered into on to-wit: October 10, 1935.

"2. Contract made by and with MOSES BAUM, duly authorized agent of defendant.

"3. Claim of BRUNSWICK RADIO CORPORATION for balance due for return of insurance premiums."

On January 6, 1939, an order was entered allowing defendant's motion for the issuance of a third party notice to Moses Baum. Defendant's affidavit for third party notice was as follows:

"Plaintiff's claim is based on an alleged contract made between the plaintiff and the defendant. The contract is alleged to have been made on behalf of the defendant by one Moses Baum, who purported to act as the duly authorized agent of the defendant. Said Moses Baum, in fact, had no authority to enter into such a contract, if such a contract was actually entered into, and said contract would not be binding upon this defendant. If the Court should find, however, that, as a matter of law, said Moses Baum was apparently acting within the scope of his authority so as to bind his principal by the aforesaid contract, then the defendant

herein is entitled to be indemnified by said Moses Baum for any liability it incurs as a result of the wrongful act of the said Moses Baum."

Defendant's affidavit of defense filed January 7, 1939, after denying all the material allegations of plaintiff's statement of claim, alleged that "if any contract was entered into by one Moses Baum purporting to act on behalf of the defendant, said contract is not binding on this defendant because said Moses Baum was not the duly authorized agent of this defendant."

On January 20, 1939, the motion of Moses Baum to vacate the order of January 6, 1939, allowing the third party notice was granted and the proceeding dismissed as to him. On February 14, 1939, defendant moved to vacate the order entered on January 20, 1939, and this motion was denied April 5, 1939.

On March 28, 1939, while defendant's motion to vacate the order of January 20, 1939, was pending and undisposed of, as were two other motions of defendant, one for discovery and one for a rule on plaintiff to file a certified copy of a deposition which had been taken by him, the trial court on plaintiff's motion entered an order dismissing the case at plaintiff's costs. Two days later plaintiff moved to vacate the order of dismissal and to reinstate the case. Over defendant's objection this motion was allowed and the case was reinstated. Thereafter, on April 11, 1939, an ex parte judgment for $422.17 was entered on plaintiff's claim against defendant.

Explanatory of the entry of the ex parte judgment against it, defendant makes this statement in its brief: "The order of March 30, 1939, vacating the order of dismissal and reinstating the case was not a final, appealable order. Therefore, some final order had to be entered in the case before defendant could appeal from the order vacating the order of dismissal. On the other hand, to have proceeded to a trial of the case on its merits might have been construed as waiving the objections to the reinstatement of the case. There is language in the decisions of this state that support this view. Faced by this apparent dilemma, defendant decided not to contest the case on its merits, but to

provide is entitled to be indemnified by such joint tort for the liability it incurs in a result of the negligent act of the joint tort-feasor.

Defendant's affidavit of intent filed January 7, 1939, after denying all the material allegations of plaintiff's statement of claim alleged that "if any contract was entered into by one Lewis Ingersoll-Lo-Ayn on behalf of the defendant, such contract is not binding on this defendant because said Lewis Ayn was not the duly authorized agent of this defendant."

On January 30, 1939, the motion of Lewis Ayn to vacate the order of January 4, 1939, allowing the claim jointly against his principal and the proposed defendant as an obligor, on February 14, 1939, defendant moved to vacate the order entered on January 4, 1939, and this motion was denied April 3, 1939.

On March 28, 1939, while defendant's motion to vacate the order of January 4, 1939, was pending and undisposed of, on motion of plaintiff's counsel, the order for discovery and for a rule on plaintiff to file a certified copy of a deposition which had been taken by him, the total assets on plaintiff's motion entered an order dismissing the case of plaintiff's claim. The day before plaintiff moved to vacate the order of dismissal and to reinstate the case. Over defendant's objection this motion was allowed and the case was reinstated. Thereafter, on April 24, 1939, an entire judgment for $401.27 was entered on plaintiff's claim against defendant.

Explanatory of the entry of the entire judgment against the defendant before this statement in the brief: "The order of March 3, 1939, vacating the order of dismissal and reinstating the case was not a final, appealable order." Therefore, more final order had to be entered in the case before defendant could appeal from the order vacating the order of dismissal. On the other hand, to have gone to a trial of the case on its merits might have been construed as waiving the objections to the jurisdiction of the court. There is language in the decisions of this state that support this view. Proof by this circuit illinois, without doubt, had to establish the case on its merits, but to

stand on its original objections to the reinstatement of the case. Accordingly, when the case was called for trial on April 11, 1939, counsel for the defendant made a statement for the record, objected to the proceedings on the ground that the case had been dismissed and had been improperly reinstated, and counsel for the defendant then withdrew from any further participation in the case. In the absence of defendant and its counsel, an ex parte finding and judgment was entered in favor of the plaintiff."

When defendant's motion to set aside the order of January 20, 1939, which vacated the order for third party notice and dismissed said third party, came up for hearing on April 5, 1939, defendant appeared for the sole purpose of objecting to the jurisdiction of the court on the ground that it lacked authority to reinstate the case after it had been dismissed on plaintiff's own motion. Upon defendant's refusal to participate in the hearing on the motion, same was peremptorily denied.

Defendant filed the following notice of appeal on April 11, 1939:

"Loebs Insurance Agency Company, a corporation, defendant and appellant above named, hereby appeals from the order entered in this cause on March 30, 1939, whereby the Court vacated the order of dismissal entered on March 28, 1939, and reinstated the case.

"Appellant prays that said order of March 30, 1939, may be reversed and judgment entered in favor of the defendant."

On May 4, 1939, by leave of court, defendant filed its amended notice of appeal.

"Loebs Insurance Agency, a corporation, defendant and appellant above named, hereby appeals from the following orders and judgment.

"1. Order entered March 30, 1939, whereby the Court vacated the order of dismissal entered on March 28, 1939, and reinstated the car

"2. Order entered April 5, 1939, denying the motion of the defendant to vacate the order entered January 20, 1939.

"3. Ex parte judgment entered April 11, 1939, finding the issues for the plaintiff and entering judgment for $422.17 and cos against the defendant.

"Appellant prays:

"1. That said order of March 30, 1939, may be rever judgment entered in favor of the defendant.

stand on its original objections to the reinstatement of the case. Accordingly, when the case was called for trial on April 12, 1939, counsel for the defendant made a statement for the record, directed to the proceedings on the ground that the case had been dismissed and had been improperly reinstated, and excepted for the defendant that without from any further participation in the case. In the interest of defendant and its counsel, on an early finding and judgment was entered in favor of the plaintiff."

Then defendant's motion to set aside the order of January 3, 1939, which vacated the order for third party notice and dismissed said third party, came up for hearing on April 3, 1939. Defendant appeared for the sole purpose of objecting to the jurisdiction of the court on the ground that it lacked authority to reinstate the case after it had been dismissed on plaintiff's own motion. Upon defendant's refusal to participate in the hearing on the merits, case was permanently dismissed.

Defendant cites the following notice of appeal on April 3, 1939:

"Notice Insurance Agency Company, a corporation, defendant and appellant above named, hereby appeals from the order entered in this cause on April 3, 1939, whereby the court vacated the order of dismissed entered on March 3, 1939, and reinstated the case.

"Appellant avers that said order of March 3, 1939, was by reason and judgment entered in favor of the defendant.

On May 4, 1939, by leave of court, defendant filed its amended notice of appeal.

"Notice Insurance Agency, a corporation, defendant and appellant above named, hereby appeals from the following orders and judgment.

"1. Order entered March 3, 1939, whereby the court vacated the order of dismissed entered on March 3, 1939, and reinstated the cause.

"2. Order entered April 3, 1939, denying the motion of the defendant to vacate the order entered March 3, 1939.

"3. Or there judgment entered April 12, 1939, finding the issues for the plaintiff and overruling judgment for defendant and against the defendant.

"Signed jurat

"1. That said order of March 3, 1939, was by reason judgment entered in favor of the defendant.

"Signed

In but in

"2. That said order entered April 5, 1939, denying the motion of the defendant to vacate the order of January 20, 1939, may be reversed and said order of January 20, 1939, vacated.

"3. That said ex parte judgment entered April 11, 1939, may be reversed and judgment entered in favor of the defendants."

The major question presented for our determination is whether the trial court had the power to vacate the order of dismissal on motion made within thirty days after the entry of such order.

As heretofore shown, the order of reinstatement was entered two days after the order of dismissal and plaintiff claims that, even though the case was dismissed on his own motion, the court had authority to set aside the dismissal and reinstate the cause under Section 83, chap. 77, Ill. Rev. Stats. 1937, which provides as follows:

"Any such judgment, decree or order may hereafter be modified, set aside or vacated prior to the expiration of thirty days from the date of its rendition or in pursuance of a motion made within such thirty days, wherever, under the law heretofore in force, it might have been modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term."

This provision of the statute merely fixes a period of thirty days instead of the term of court, as was formerly the rule, as the time within which a judgment, decree or order might be modified or vacated. It does not change the substantive law relative to the rights of the parties affected by such judgments, decrees and orders.

It has been repeatedly held that, where a case is dismissed on plaintiff's own motion, the court has no power to set aside the order of dismissal and to reinstate the case over the objection of the defendant in the absence of fraud or excusable mistake. Plaintiff did not file a petition or an affidavit or advance any reason in support of his motion to vacate the order of dismissal and the trial court vacated said order and reinstated the case merely because of its misapprehension as to the effect of Rule 123 of the Municipal court.

In Reisgath v. Supreme Tribe Ben Hur, 372 Ill. 541, in discussing the jurisdiction of a trial court to entertain a motion to vacate an order of dismissal entered on plaintiff's motion, the court said at p. 543:

or vacated.

"In involuntary nonsuits the court may, in its discretion, set aside the order of dismissal and reinstate the cause. In case of a voluntary nonsuit upon motion of a plaintiff the court has no power to set aside the order of dismissal and reinstate the cause unless at the time the nonsuit is taken leave is given the plaintiff to move to set it aside. (Harnes v. Barber, 1 Gilm. 401; Lombard v. Chever, 3 id. 469.) The reason for this rule is apparent. If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit he must be held to have anticipated the effect and necessary results of this action and should not be restored to the position and the rights which he voluntarily abandoned. Having taken a nonsuit, his only recourse is to begin his action anew."

Passing upon the same question in Dunsay v. Hooker, 67 Wis. 322, the court said at p. 325:

"Any other rule would work great hardship to a defendant. He could never know when he was out of court and would have to be constantly prepared to meet and defend a case once brought against him, notwithstanding its discontinuance. The reason given for setting aside this discontinuance is insufficient, even if the court had power to set it aside for any reason. It was ignorance of either the law or of a fact that the learned counsel of the respondent ought to have known, and might have readily known, before the discontinuance of the action. Suppose a plaintiff should voluntarily discontinue his suit because at the time he should be of the opinion that he could not maintain it, and he afterwards had formed a different opinion, would such a reason be a good one for reinstating the action, and for the court to treat the defendant 'as being in court and out of court at the same time,' and for the court 'to suffer its proceedings to be trifled with, even if parties were disposed to back and fill and to vacillate in the conduct of the suit,' ***. We think not. The circuit court erred in granting the motion to set aside the discontinuance and to reinstate this cause."

Considering the identical question, the court in Simmons v. Brock, 114 Ga. 294, said at pp. 294, 295:

"The motion to reinstate was on the grounds that the case was called out of its order for trial, that the plaintiff, for reasons assigned, was unavoidably absent, and that because of his absence his counsel was unable to prove certain facts essential to the maintenance of his action. It affirmatively appears, however, that the case was dismissed 'on motion of plaintiff's counsel.' It is inferable that counsel took this step in order to prevent a verdict for the defendant. The fact nevertheless remains that the act of dismissing the case was that of the plaintiff's own counsel; and this being so, it is obvious that the court had no authority to reinstate the case over the defendant's objection. Had the court improperly dismissed the action, the question would be entirely different; but the plaintiff, through his counsel, having taken his own case out of court, whether for a good reason or a bad one, the matter was at an end, and the judge had no further power over it."

The wisdom of the rule announced by the foregoing authorities is aptly illustrated by plaintiff's conduct in the instant case. He is an attorney, representing himself in this proceeding, and it is inferable that when he moved to dismiss the suit he thought he would gain some advantage. The mere fact that he changed his mind and con-

cluded a few days later that he had pursued the wrong course, certainly furnished no adequate or sufficient reason to reinstate the case, even if the court had the power to do so.

Rule 122 of the Rules of Practice of the Municipal court of Chicago, including Note 1 appended thereto, provides:

"The plaintiff may, at any time before the filing of the defendant's defense, or after the filing of such defence before taking any other proceeding in the action (other than an interlocutory application), by notice in writing or in open court to the defendant or defendants, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of action and thereupon he shall pay to the defendant or defendants their costs in the action, or, if the action be not wholly discontinued, such portion of such costs as the court may deem just. Save as in this rule is otherwise provided, it shall not be competent for the plaintiff to discontinue the action, but the court may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of action to be struck out. A discontinuance of any action by the plaintiff shall not affect the right of a defendant to prosecute any counterclaim theretofore filed.

"Note to Rule 122.

"1. This takes away the power of a plaintiff heretofore existing to claim a nonsuit."

In vacating the order of dismissal and reinstating the case the trial judge stated: "The question comes up under our Rule 122. There is no such thing as a voluntary nonsuit." The judge then proceeded to state that "under our rule *** the only kind of dismissal that there can be" is an involuntary dismissal and that, therefore, his order dismissing the case on plaintiff's motion was erroneous. The misapprehension of the court in its interpretation of the meaning and intent of Rule 122 was undoubtedly due to the inapt phrasing of Note 1 to said rule, which contains an incorrect conclusion as to what Rule 122 actually provides. This rule does not take away a plaintiff's right to claim a nonsuit, but it does make it more difficult to do so and Note 1 should have been restricted to such a declaration. The rule expressly gives to a plaintiff the right to voluntarily discontinue his action but places limitations upon such right. Nowhere in the rule does it say that a plaintiff cannot under any circumstances make a motion to dismiss his case or enter a voluntary nonsuit. Prior to the adoption of this rule plaintiffs often resorted to the expedient of claiming a nonsuit to avoid the entry of a judgment

stated a few days later that he had pardoned the young woman, certainly
influenced by subjects or sufficient reason to retracts the order, even
if the court had the power to do so.

Rule 121 of the Rules of Practice of the Municipal Court of
Chicago, including Rule 1 approved thereby, provides:

"The plaintiff may, at any time before the filing of the
defendant's answer, or after the filing of such answer before trial
and after proceeding in the action (after that on interlocutory appli-
cation), by notice in writing or by open entry in the docket of
proceedings, wholly discontinue the action against all or any of the
defendants or dismiss any part or parts of the claims made or
action and thereupon he shall pay to the defendant or defendants
sued in the action, all of the costs in the action accrued
upon service of such notice or the entry upon the docket. Upon or at
any time in interlocutory proceedings, it shall not be compulsory for the
plaintiff to discontinue the action, but the court may, before, during or
or after the trial or hearing of the cause, or at any time, and as to
any other relief, and adjudicate as may be just, order the action to
be discontinued, as to any part of the claimed under of action to be dismis-
sed. A discontinuance of any action by the plaintiff shall not affect
the right of a defendant to prosecute any counterclaim therein filed.

Rule 1 reads:

"Jurisdiction over the person of a plaintiff hereafter is
acquired by summons."

In quashing the order of dismissal and reinstating the case the
trial judge stated: "The question comes up under rule 121. There is
no rule taking as a voluntary nonsuit." The Appellate Court provided in stric
that "there can only be one kind of dismissal that there can be" is
an involuntary dismissal and that, therefore, his order dismissing the
case on plaintiff's motion was erroneous. The misapprehension of the
court in the interpretation of the wording and intent of rule 121 was
undoubtedly due to the inept pleading of Rule 1. In said rule, which
concerns the jurisdiction acquired as to what rule 121 actually provides.
The rule does not take away a plaintiff's right to plead a nonsuit, but
it does make it more difficult to do so and this Rule 1 should have been
restricted to such a pleadership. The rule expressly gives to a plaintiff
the right to voluntarily discontinue his action but clogs discontinuance
with right. Whether in the rule does it say that a plaintiff cannot under
any circumstances make a motion to dismiss his case or enter a voluntary
nonsuit. Prior to the adoption of this rule plaintiffs often resorted
to the expedient of dismissing a nonsuit to avoid the entry of a judgment

against them on the merits of the cause. Plaintiffs were formerly allowed to take voluntary nonsuits at any time before a trial court's finding was announced or a jury's verdict was returned. This led to many abuses to the prejudice of the rights of defendants and intervening parties and it was to correct this practice that rule 122 was adopted. This cause had not proceeded to the stage where plaintiff's right to dismiss or to take a voluntary nonsuit was barred by any limitation contained in the rule. We think the court was confused by Note 1 appended to the rule and clearly misconstrued the rule itself.

Plaintiff's contention that defendant waived its objection to the jurisdiction of the court after the cause was dismissed and reinstated is not supported by the record and is without merit. When the case was dismissed the court lost all jurisdiction both of the person and the subject matter and defendant thereafter participated in no proceeding in the cause that waived its right to object to the lack of jurisdiction of the court to reinstate the case. As heretofore shown, there were only two hearings in the cause after it was reinstated, one on defendant's pending motion to vacate the order striking the third party notice and the other when the case was called for trial. On both of these occasions defendant merely offered his objection to the jurisdiction of the court and then refused to participate in said hearings. Plaintiff's claim that defendant's appeal from the order of April 5, 1939, denying its motion to vacate the order of January 20, 1939, striking the third party notice and dismissing said third party, constitutes a waiver of defendant's objection to the lack of jurisdiction of the court to reinstate the case, may be disregarded as entirely lacking in merit.

In our opinion the trial court was clearly in error in reinstating the case after it had been dismissed on plaintiff's own motion, and in order to rectify the error and restore the case to its proper status, it is necessary that both the ex parte judgment of April 11, 1939, and the order of March 30, 1939, vacating the order of dismissal and reinstating the cause be reversed.

statute then on the merits of the issue. Plaintiffs were invariably allowed to take voluntary dismissals at any time before a total court's finding was announced on a jury's verdict was returned. This led to many changes in the pleadings of the rights of defendants and intervening parties and it was to correct this problem that Tule 41 was adopted. This rule had not provided to the trial court plaintiff's right to dismiss by to take a voluntary dismissal was barred by any limitation contained in the rule. In that the court was confronted by this 1 appellees to the rule and clearly enunciated the rule itself.

PLAINTIFF's contention that defendant waived its objection to the jurisdiction of the court after the court was its distance and petitioned in not represented by the record and in without merit. Then the case was dismissed the court lost all jurisdiction both of the person and the subject matter and defendants thereafter participated in no proceeding in the court that waived its right to object to the lack of jurisdiction of the court to entertain the suit. As hereinbefore shown, there were only two hearings in the cause after it was dismissed, one on defendant's petition seeking to vacate the order sustaining the third party pleas and the other when the case was called for trial. In both of these occasions defendant merely affirmed its objections to the jurisdiction of the court and then refused to participate in said hearings. PLAINTIFF's claim that defendant's appeal from the order of August 5, 1938, denying its motion to vacate the order of January 10, 1938, sustaining the third party pleas and dismissing such third party, constitutes a waiver of defendant's objection to the lack of jurisdiction of the court to entertain the suit, may be disregarded as entirely lacking in merit.

In our opinion the trial court was clearly in error in sustaining the pleas filed in bar being dismissed on PLAINTIFF's own motion, and in motion to set aside the order and reviews the case on the pleas stated, it is necessary that we do the ex novo judgment of April 21, 1938, and the order of March 10, 1938, vacating the order of dismissal and reinstating the third party pleas.

Since we have concluded that this case must stand dismissed in the trial court as of March 28, 1939, the order of April 5, 1939, denying defendant's motion to vacate the order of January 20, 1939, which struck the third party notice and dismissed said third party is void, since the cause was not properly pending when that order was entered.

For the reasons stated herein the ex parte judgment of April 11, 1939, and the order of March 30, 1939, vacating the order of dismissal and reinstating the case, are reversed.

JUDGMENT OF APRIL 11, 1939, AND ORDER OF MARCH 30, 1939, REVERSED.

Friend and Scanlan, JJ., concur.

Since we have mentioned that this work has been about dimensions, in the total amount as of March 28, 1919, the author of Jewish, 5, 1919, designing information's machine to remove the error of memory 28, 1919, which proves the total energy motion and distances such total energy is really about the state was not improvisly possible that which was motion.

For the Jewish Period Jewish the <u>Jewish</u> Judgment of April 24, 1919, and the Book of March 30, 1919, showing the motion of Electrical and representing the work, are invented.

Friend and Jewish, 24, summer.

41130

ANNA POULOPOULOS, as administratrix of the estate of DR. ANDREAS I. POULOPOULOS, deceased,
Appellee,

v.

HELLENIC BROTHERHOOD "MESSENIA," a fraternal benefit society,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by Andreas I. Poulopoulos on January 5, 1938, to recover salary claimed to be due him for the unexpired term of his employment under a contract of employment between him and defendant. Poulopoulos died July 1, 1938, and Anna Poulopoulos, having been appointed administratrix of his estate, suggested his death and was substituted as plaintiff herein on November 23, 1938. On that same date it was ordered that the "suit and proceedings do stand revived against *** defendant herein, and be in the same state and condition they were in at the time of the death of said Dr. Andreas I. Poulopoulos, deceased," and that the substituted plaintiff be granted leave to file an amended complaint.

Her amended complaint alleged that the deceased was a duly licensed physician; that defendant was an incorporated fraternal benefit society, fully empowered to enter into the contract upon which this action is predicated; that upon the death of Poulopoulos, she was appointed administratrix of his estate and that she prosecutes this action in his place and stead; that the deceased applied for the position of medical "Director-Examiner" of defendant society; that he was elected to said office and inducted into same on December 18, 1936, for the ensuing calendar year; that the fixed salary of the office was $65 a month, payable monthly; that deceased entered upon the performance of his duties on December 18, 1936, and continued to perform same until February 5, 1937, at which time defendant

41130

ANNA POULOPOULOS, as administratrix of the estate of DR. ANDREAS I. POULOPOULOS, deceased,

Appellee,

v.

HELLENIC MOUNTAINTOP "ELEUSINIA", a fraternal benefit society,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

304 I.A. 576

MR. PRESIDING JUSTICE MILLAR DELIVERED THE OPINION OF THE COURT.

This action was brought by Andreas I. Poulopoulos on January 5, 1938, to recover salary claimed to be due him for the unexpired term of his employment under a contract of employment between him and defendant. Poulopoulos died July 1, 1938, and Anna Poulopoulos, having been appointed administratrix of his estate, suggested his death and was substituted as plaintiff herein on November 23, 1938. On that same date it was ordered that the "suit and proceedings do stand revived against *** defendant herein, and be in the same state and condition they were in at the time of the death of said Dr. Andreas I. Poulopoulos, deceased," and that the substituted plaintiff be granted leave to file an amended complaint.

Her amended complaint alleged that the deceased was a duly licensed physician; that defendant was an incorporated fraternal benefit society, fully empowered to enter into the contract upon which this action is predicated; that upon the death of Poulopoulos, she was appointed administratrix of his estate and that she prosecutes this action in his place and stead; that the deceased applied for the position of medical "Director-Examiner" of defendant society; that he was elected to said office and inducted into same on December 18, 1936, for the ensuing calendar year; that the fixed salary of the office was $65 a month, payable monthly; that deceased entered upon the performance of his duties on December 18, 1936, and continued to perform same until February 5, 1937, at which time defendant

"wrongfully discharged him without cause and refused to permit him to complete his term of office;" that Poulopoulos was at all times during the term for which he was elected ready, willing and able to perform any and all of the duties of his office; and that defendant refused to pay the balance of $675 due on his salary for the period of ten months and eleven and one-half days, during which he was wrongfully prevented from performing his duties.

Defendant's answer to the amended complaint, after admitting all of the allegations of said complaint except those charging that Poulopoulos was wrongfully discharged, alleged that complaints were filed against the deceased; that proper hearings were had on said complaints; and that the Supreme Lodge of defendant society in discharging him acted in accordance with and pursuant to Section 2, Article 15 of its constitution and by-laws. The answer then denied that defendant was indebted to Poulopoulos in any sum whatsoever.

By reason of the admissions contained in defendant's answer, the only issue remaining before the trial court was whether defendant had the right to discharge the deceased as and when it did. On this issue an affirmative defense was presented, which defendant had the burden of proving. The cause was tried by the court without a jury and to establish its defense defendant called three witnesses who were officers or members of the fraternal benefit society. Defendant offered to prove by these witnesses that the by-laws of the defendant society provided that "such physician may be removed and his salary discontinued by a majority vote of the Supreme Lodge for good cause shown against him;" and that the minute books of the Convention and the Supreme Lodge meetings contained the complaints filed against Dr. Poulopoulos, the original plaintiff, and the action taken by the Supreme Lodge in discharging him.

Plaintiff's counsel interposed the objection that

"wrongfully discharged him without cause and refused to permit him to complete his term of office;" that Poulopoulos was at all times during the term for which he was elected ready, willing and able to perform any and all of the duties of his office; and that defendant refused to pay the balance of $697 due on his salary for the period of ten months and eleven and one-half days, during which he was wrongfully prevented from performing his duties.

Defendant's answer to the amended complaint, after admitting all of the allegations of said complaint except those charging that Poulopoulos was wrongfully discharged, alleged that complaints were filed against the deceased; that proper hearings were had on said complaints; and that the Supreme Lodge of defendant society in discharging him acted in accordance with and pursuant to Section 2, Article IV of its constitution and by-laws. The answer then denied that defendant was indebted to Poulopoulos in any amount whatsoever.

By reason of the admissions contained in defendant's answer, the only issue remaining before the trial court was whether defendant had the right to discharge the deceased as and when it did. On this issue an affirmative defense was presented, which defendant had the burden of proving. The cause was tried by the court without a jury and to establish its defense defendant called three witnesses who were officers or members of the fraternal benefit society. Defendant offered to prove by these witnesses that the by-laws of the defendant society provided that "such physician may be removed and his salary discontinued by a majority vote of the Supreme Lodge for good cause shown against him;" and that the minute books of the Convention and the Supreme Lodge meetings contained the complaints filed against Dr. Poulopoulos, the original plaintiff, and the actions taken by the Supreme Lodge in discharging him.

Plaintiff's counsel interposed the objection that

the three witnesses called by defendant were incompetent to testify and the trial court sustained the objection, holding that since said witnesses were members of defendant fraternal benefit society they were incompetent to testify under section 2 of the Evidence Act (chap. 51, sec. 2, Ill. Rev. Stat. 1937) which provides in part as follows:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending ***."

The court thereupon excluded all of the documentary evidence that defendant had offered and had sought to authenticate by the testimony of the aforesaid witnesses. No further evidence being offered by defendant the issues were found in favor of plaintiff and judgment rendered against defendant for $675 and costs.

The only question presented is whether members of a fraternal benefit society, under the circumstances disclosed in this case, were incompetent as witnesses under section 2 of the Evidence Act.

Notwithstanding that the Supreme Court of this state has held that members of fraternal benefit organizations are incompetent as witnesses where an action is brought against such an organization by the administratrix of a deceased person, defendant strenuously urges and insists that we hold that the decisions of the Supreme Court on this question are not controlling. This we cannot do. If the Supreme Court wants to abrogate or modify its former decisions in this regard, that is strictly within its province.

In Cronin v. Royal League, 199 Ill. 228, the court said at pp. 233, 234:

"The Appellate Court, in affirming the judgment of the court below, did not hold the notice valid, but decided that under the evidence Philip P. H. Cronin had waived the defects herein pointed out. That conclusion is based upon the testimony of the collector of the defendant, Edmund G. Ingersoll. When called as a witness on its behalf he was asked by counsel for the plaintiff, 'Are you still a member of the Royal League?' and answered, 'Yes, sir.' Plaintiff thereupon objected

the three witnesses called by defendant were incompetent to testify and the trial court sustained the objection, holding that since said witnesses were members of defendant fraternal benefit society they were incompetent to testify under section 2 of the Evidence Act (chap. 51, sec. 2, Ill. Rev. Stat. 1937) which provides in part as follows:

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In Gronin v. Royal Leagues, 199 Ill. 228, the court said at pp. 231, 234:

"The appellate Court, in affirming the judgment of the court below, did not hold the notice valid, but decided that under the evidence Phillip F. E. Gronin had waived the defects merely pointed out. That conclusion is based upon the testimony of the collector of the defendant, Edmund G. Imperoli. When called as a witness on its behalf he was asked by counsel for the plaintiff, 'Are you still a member of the Royal Leagues?' and answered, 'Yes, sir.' Plaintiff thereupon objected

to his testifying to any conversation had with Dr. Cronin, on the ground that under the statute of the State no person directly interested is competent to testify in any civil action or suit where the other party sues or defends as administrator of any deceased person. The objection was overruled and an exception duly taken, and this ruling is also urged as reversible error. *** But the question of the competency of the witness, Ingersoll, remains. If he was interested in the result of the suit it is clear that he was incompetent to testify against the plaintiff, suing as administratrix. The statute so expressly provides. (Starr & Cur. Stat. chap. 51, sec. 2, p. 1824.) We have held that stockholders in an ordinary corporation are incompetent, on the ground of interest, to testify in an action by or against the corporation. (Albers Commission Co. v. Sessel, 193 Ill. 153, and cases cited.) On the same principle it would seem that a member of a benefit association like this is interested in the result of a suit against the society upon a benefit certificate. No effort whatever is made by counsel for defendant in error to answer the objection urged against the competency of the witness, nor was the question decided in the Appellate Court. We think the objection to the witness should have been sustained."

In Adams v. First M. E. Church, 251 Ill. 268, the court said at p. 271:

"Stockholders of business or moneyed corporations are directly interested in the result of a suit involving the title of property claimed by the corporation, because such property would increase their dividends or lessen their legal liabilities. (Albers Commission Co. v. Sessel, 193 Ill. 153.) So, also, members of a beneficiary society bound to contribute to the payment of its liabilities have a direct, personal, pecuniary interest in the result of a suit concerning a liability. (Cronin v. Royal League, 199 Ill. 228.)

Other points urged by both parties have been considered but we think they are without merit and deem it unnecessary to discuss them.

The judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friehd and Scanlan, JJ., concur.

to his testifying to any conversation had with Dr. Dromin, on the ground that under the statute of the State no person directly interested is competent to testify in any civil action or suit where the other party sues or defends as administrator of any deceased person. The objection was overruled and on exception duly taken, and this ruling is also urged as reversible error, was but the question of the competency of the witness, improperly, regards. If he was interested in the result of the suit as it is clear that he was incompetent to testify against the plaintiff, being an administrator. The statute so correctly provides. (Ohare & Gur. Stat. chap. 51, sec. 4, p. 1024.) So here land trust holders in an ordinary corporation are incompetent, on the ground of interest, to testify in an action by or against the corporation. (Albers Commission Co. v. Haegel, 197 Ill. 191, and cases cited.) On the same principle it would seem that a member of a monetary association like this is interested in the result of a suit against the society upon a benefit certificate. No error whatever is made by counsel for defendant in error to answer the objection urged against the competency of the witness, nor was the question raised in the Appellate Court. We hold the objection to the witness should have been sustained."

In Adams v. First N. T. Church, 271 Ill. 362, the court said at p. 271:

"Stockholders of business or monetary corporations are directly interested in the result of a suit involving the title of property claimed by the corporation, because such property would increase the dividends or lessen their legal liability. (Albers Commission Co. v. Haegel, 197 Ill. 191.) So, also, members of a beneficiary society bound to contribute to the payment of its liabilities have a direct, personal, pecuniary interest in the result of a suit concerning a liability. (Grondin v. Royal Leagues, 197 Ill. 590.)

Other points urged by both parties have been considered but we think they are without merit and does it unnecessary to discuss them.

The judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend and Heming, JJ., concur.

40450

PAUL A. CORSO, trading as Royal Smart Shoe Company, Appellee,

v.

ALBERT J. HORAN, Bailiff of the Municipal court of Chicago, and DOROTHY SHERWIN, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Dorothy Sherwin had judgment against one Moses Rosenberg in the sum of $664.28. Execution issued thereon and a levy was made against some 200 pairs of shoes contained in Rosenberg's retail men's wear store. While the merchandise was in possession of Albert J. Horan, bailiff of the Municipal court, and prior to sale, Rosenberg's creditors filed an involuntary petition in bankruptcy against him and an order was entered in the United States District Court restraining the bailiff from selling Rosenberg's merchandise and directing the bailiff to turn over the stock of goods, consisting of men's furnishings and shoes, to the receiver of the bankrupt's estate. While the matter was pending in the Federal court Paul A. Corso, trading as Royal Smart Shoe Company, plaintiff herein, filed a petition to reclaim certain shoes from the bankrupt's estate, to which he claimed title by virtue of a consignment agreement made with Rosenberg, antedating the levy and bankruptcy petition. Dorothy Sherwin thereupon also filed a petition in the Federal court, alleging that her claim to the shoes was prior and paramount to that of Corso and asking that the shoes be returned to the bailiff. After a full hearing before a referee in bankruptcy who considered the respective claims of the parties and their contentions as to the legal effect of the consignment agreement, with supporting authorities, the shoes were ordered to be returned to

PAUL A. CORSO, trading as
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and DOROTHY SHERWIN,
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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

304 I.A. 576

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

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the bailiff, with the following finding: "That on January 8, 1937, Paul Corso, trading as Royal Smart Shoe Co., entered into an agreement with Moses Rosenberg, the bankrupt herein, wherein it was provided that the said Paul Corso, trading as Royal Smart Shoe Co., would deliver to the bankrupt from time to time merchandise on consignment, of which the aforesaid personal property was a part, with the express condition that title to said merchandise would at all times remain with said Paul Corso, trading as Royal Smart Shoe Co., and that neither the bankrupt nor the Trustee in Bankruptcy herein has, or has had, any right, title or interest in or toisaid personal property." In compliance with this order the shoes were returned to the bailiff of the Municipal court and the remainder of the bankrupt's estate was sold by the receiver for the benefit of the bankrupt's creditors.

Subsequently plaintiff filed an action in Trial of Right of Property in the Municipal court against Albert J. Horan, Bailiff, and Dorothy Sherwin, alleging that he was the owner of the shoes and entitled to the possession thereof. Dorothy Sherwin filed a motion to strike plaintiff's statement of claim on the ground that the referee's order was res adjudicata, the same question having been determined by the order entered in the Federal court. Plaintiff filed a countermotion in which he agreed with defendantsthat the referee's order was res adjudicata, that the question had already been determined by the referee, and he averred that defendants were estopped from denying plaintiff's title by virtue of said order. On hearing of their motion to strike defendants introduced in evidence the consignment agreement between Corso and Rosenberg and also the order of the referee. The trial court thereupon overruled their motion to strike and on stipulation of the parties the cause was submitted to the court on the merits on the evidence already heard on defendants' motion to strike, resulting in a finding of title in plaintiff and judgment accordingly, from which defendants appeal.

The sole question involved on the merits of this appeal is whether title is in Rosenberg or in Corso. This question was

the bailiff, with the following finding: "That on January 6, 1917, Paul Corso, trading as Royal Smart Shoe Co., entered into an agreement with Moses Rosenberg, the bankrupt herein, wherein it was provided that the said Paul Corso, trading as Royal Smart Shoe Co., would deliver to the bankrupt from time to time merchandise on consignment, of which the aforesaid personal property was a part, with the express condition that title to said merchandise would at all times remain with said Paul Corso, trading as Royal Smart Shoe Co., and that neither the bankrupt nor the Trustee in Bankruptcy herein has, or has had, any right, title or interest in or to said personal property." In compliance with this order the shoes were returned to the bailiff of the Municipal court and the remainder of the bankrupt's estate was sold by the receiver for the benefit of the bankrupt's creditors.

Subsequently plaintiff filed an action in Trial of Right of Property in the Municipal court against Albert J. Horen, Bailiff, and Dorothy Sherwin, alleging that he was the owner of the shoes and entitled to the possession thereof. Dorothy Sherwin filed a motion to strike plaintiff's statement of claim, on the ground that the referee's order was res adjudicata, the same question having been determined by the order entered in the Federal court. Plaintiff filed a countermotion in which he agreed with defendantsthat the referee's order was res adjudicata, that the question had already been determined by the referee, and he averred that defendants were estopped from denying plaintiff's title by virtue of said order. On hearing of their motion to strike defendants introduced in evidence the consignment agreement between Corso and Rosenberg and also the order of the referee. The trial court thereupon overruled their motion to strike and on stipulation of the parties the cause was submitted to the court on the merits on the evidence already heard on defendants' motion to strike, resulting in a finding of title in plaintiff and judgment accordingly, from which defendants appeal.

The sole question involved on the merits of this appeal is whether title is in Rosenberg or in Corso. This question was

definitely and finally decided by the referee's order. Both plaintiff and defendants chose the Federal court as a forum for the determination of this issue. There were numerous hearings before the referee with citations of authorities bearing upon the construction of the agreement between Rosenberg and Corso, and we think the Municipal court properly held the order of the referee to be final and determinative of the issue and binding on the defendants. If the Municipal court had held otherwise the shoes would have had to be returned to the Federal court because they would then have become a part of the bankrupt's estate to be sold for the benefit of all of Rosenberg's creditors, the same as the remainder of his estate. Authorities are abundant to the effect that where some controlling fact or matter material to the determination of both causes has been adjudicated in a former proceeding by a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties, the adjudication of the fact or matter in the first suit, if properly presented and relied upon, will be conclusive of the same question in the later suit. (Ropacki v. Ropacki, 354 Ill. 502, 507; Dempster v. Lansingh, 244 Ill. 402, 411; Stoll v. Gottlieb, 305 U. S. 165.)

Before making the order of affirmance we regret that we are obliged to consider and dispose of charges contained in certain motions made during the pendency of this appeal. December 1, 1938, plaintiff moved to strike appellants' abstracts and briefs and to dismiss the appeal. Upon examination of defendants' brief plaintiff's counsel discovered and pointed out in detail numerous instances wherein decisions relied upon by defendants were badly misquoted, the language of the court mutilated and paraphrased, and parts of the opinions which counsel purported to quote were entirely omitted or words added which did not appear in the opinions at all, thus changing the meaning of the decisions and making them appear to be in harmony with defendants' theory of the case.

Counsel admits that defendants' brief contains "jumbled, mis-

definitely and finally decided by the referee's order. Both plaintiff and defendants chose the Federal court as a forum for the determination of this issue. There were numerous hearings before the referee with citations of authorities bearing upon the construction of the agreement between Rosenberg and Corso, and we think the Municipal court properly held the order of the referee to be final and determinative of the issue and binding on the defendants. If the Municipal court had held otherwise the chose would have had to be returned to the Federal court because they would then have become a part of the bankrupt's estate to be sold for the benefit of all of Rosenberg's creditors, the same as the remainder of his estate. Authorities are abundant to the effect that where some controlling fact or matter material to the determination of both causes has been adjudicated in a former proceeding by a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties, the adjudication of the fact or matter in the first suit, if properly presented and relied upon, will be conclusive of the same question in the later suit. (Kopecki v. Kopecki, 75 Ill. App. 277; Dempster v. Kennedy, 244 Ill. 400, 411; Sloll v. Dobbins, 305 U. S. 165.)

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Counsel admits that defendants' brief contains "inaccurate, mis-

quoted opinions, incorrectly printed," but offers the ingenious reply that "in some way unknown to appellants or their attorney the matters set forth in pages 13 to 18, inclusive, got mixed up after copy had been delivered to the printers. The briefs were printed and were filed by the printers in this court without counsel for appellants having had any opportunity of inspecting the briefs. *** In some way the galleys got mixed up and the error occurred, and the first counsel for appellants knew of it was when on inspecting the brief for another matter *** the error was discovered, and thereafter counsel for appellants filed a motion *** praying for leave to correct these briefs."

The record discloses that the motion to file corrected briefs was made after our attention had been called to the misquotations by opposing counsel. The motion was denied. It was subsequently renewed and again denied. The explanation offered is palpably improbable. While an occasional error may occur in quoting from an opinion, it is inconceivable that a printer would err so ingeniously and repeatedly by changing the context of opinions as to decisively uphold defendants' theory of the case, even to the extent of adding key words to make the decisions fix the case at bar. Having twice denied counsel's motion to file corrected briefs upon his representation that the misquotations were due to the fault of the printer, he filed reply briefs on January 26, 1939, almost two months after the matter was first called to our attention, and repeated similar offenses by changing words in opinions, deleting some of the pertinent language of the court and ending quotations in the middle of a sentence, omitting parts of the opinions which had an important bearing upon the decisions of the courts. In this situation we cannot permit defendants' briefs and reply briefs to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of the bar of his obvious duty to the court. (Royal Arcanum v. Green, 237 U. S. 531.) The motion to strike defendants' brief and reply brief is therefore allowed, and the judgment of the Municipal court is affirmed, in accordance with the views herein expressed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

quoted opinions, incorrectly printed," but offers the ingenious reply that "in some way unknown to appellants or their attorney the matters set forth in pages 13 to 18, inclusive, got mixed up after copy had been delivered to the printers. The briefs were printed and were filed by the printers in this court without counsel for appellants having had any opportunity of inspecting the briefs. *** In some way the galleys got mixed up and the error occurred, and the first counsel for appellants knew of it was when on inspecting the brief for another matter *** the error was discovered, and thereafter counsel for appellants filed a motion *** praying for leave to correct these briefs."

The record discloses that the motion to file corrected briefs was made after our attention had been called to the misquotations by opposing counsel. The motion was denied. It was subsequently renewed and again denied. The explanation offered is palpably improbable. While an occasional error may occur in quoting from an opinion, it is inconceivable that a printer would err so ingeniously and repeatedly by changing the context of opinions as to decisively uphold defendants' theory of the case, even to the extent of adding key words to make the decisions fit the case at bar. Having twice denied counsel's motion to file corrected briefs upon his representation that the misquotations were due to the fault of the printer, he filed reply briefs on January 26, 1939, almost two months after the matter was first called to our attention, and repeated similar offenses by changing words in opinions, deleting some of the pertinent language of the court and ending quotations in the middle of a sentence, omitting parts of the opinions which had an important bearing upon the decisions of the courts. In this situation we cannot permit defendants' briefs and reply briefs to pass unnoticed or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of the bar of his

sullivan, J., and Beaman, J., concur.

JUDGMENT AFFIRMED.

The motion to strike defendants' brief and reply brief is therefore allowed, and the judgment of the municipal court is affirmed, in accordance with the views herein expressed.

(Legal Abstracts v. Green, 237 U. S. 323.)

Violate duty to the court.

40688

LIZZIE SCHABERG,
Appellee,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Lizzie Schaberg was designated as beneficiary in a life insurance policy issued by the defendant, John Hancock Mutual Life Insurance Company, to her brother, William Kerrigan. Kerrigan disappeared in the summer of 1928, and has not been heard from since. Plaintiff sued to recover the value of the policy and the return of certain premiums paid by her after demand was made on defendant for the value of the policy. Trial was had by the court without a jury, resulting in findings and judgment in favor of plaintiff in the sum of $527.07, from which this appeal is taken. Plaintiff assigned cross-errors, claiming that defendant refused to pay the proceeds of the policy on demand, that its refusal was vexatious and without reasonable cause, and that she is entitled, under chapter 73, section 767, Ill. Rev. Stats. 1939, to the allowance of reasonable attorney's fees as part of the taxable costs by reason of the delay.

Under the policy issued to Kerrigan December 1, 1926, defendant agreed to pay to plaintiff, as beneficiary, the sum of $504 in the event of Kerrigan's death. Either Kerrigan, or someone acting in his behalf, paid the premiums on the policy from time to time, so that it was in full force and effect when plaintiff lodged her claim against defendant.

The evidence discloses that although Kerrigan was married he was not living with his wife when he disappeared, and there is no

Hazzie Schaberg was designated as beneficiary in a life insurance policy issued by the defendant, John Hancock Mutual Life Insurance Company, to her brother, William Kerrigan. Kerrigan disappeared in the summer of 1926, and has not been heard from since. Plaintiff sued to recover the value of the policy and the return of certain premiums paid by her after demand was made on defendant for the value of the policy. Trial was had by the court without a jury, resulting in findings and judgment in favor of plaintiff in the sum of $527.07, from which this appeal is taken. Plaintiff assigned cross-error, claiming that defendant refused to pay the proceeds of the policy on demand, that its refusal was vexatious and without reasonable cause, and that she is entitled, under chapter 73, section 707, Ill. Rev. Stats. 1927, to the allowance of reasonable attorney's fees as part of the taxable costs by reason of the delay.

Under the policy issued to Kerrigan December 1, 1926, defendant agreed to pay to plaintiff, as beneficiary, the sum of $504 in the event of Kerrigan's death. Either Kerrigan, or someone acting in his behalf, paid the premiums on the policy from time to time, so that it was in full force and effect when plaintiff lodged her claim against defendant.

The evidence discloses that although Kerrigan was married he was not living with his wife when he disappeared, and there is no

evidence to indicate that his wife was living at the time of his disappearance. Kerrigan lived at plaintiff's home during the summer of 1928 and for long periods of time prior thereto. Plaintiff and her family had arranged to leave on a vacation in August of that year, and she testified that until her return arrangements had been made for Kerrigan to stay at his brother's home. He evidently resided with his brother for a short time, but disappeared immediately thereafter and has never since been heard from.

The law is well settled that the prerequisities which justify a presumption of death are (1) that the person whose death is in question has disappeared from his last known abode, domicile or residence; (2) that he has neither returned thereto nor communicated with those with whom he would naturally communicate, if living; and (3) that inquiry had been made at the last known place of abode of the persons who would naturally hear from him, without obtaining information that he is alive. (Piersol v. Mass. Mutual Life Ins. Co., 260 Ill. App. 578; Hitz v. Ahlgren, 170 Ill. 60; Policemen's Ben. Ass'n v. Ryce, 213 Ill. 9.) Out of proof of such material facts the presumption of death arises as a matter of law which may be rebutted or disproved by evidence of facts tending to show that the party presumed to be dead is alive.

In order to bring the case within the prerequisites laid down by the established rule in this state plaintiff adduced evidence to show Kerrigan's unexplained disappearance from his last known abode in August, 1928. Numerous witnesses who knew him testified that they had not seen him since he resided at the home of plaintiff, his sister, during that year. Some of the witnesses said that they had made inquiries of friends and people who knew Kerrigan, concerning his whereabouts. Defendant stresses the fact that Kerrigan went to reside with his brother, after leaving plaintiff's home in August, 1928; that therefore the home of his brother was his last known place of abode, and that there is no evidence to prove that he disappeared from his brother's home. It appears from the record, however, that the latest

evidence to indicate that his wife was living at the time of his disappearance. Kerrigan lived at plaintiff's home during the summer of 1928 and for long periods of time prior thereto. Plaintiff and her family had arranged to leave on a vacation in August of that year, and she testified that until her return arrangements had been made for Kerrigan to stay at his brother's home. He evidently resided with his brother for a short time, but disappeared immediately and has never since been heard from.

The law is well settled that the prerequisities which justify a presumption of death are (1) that the person whose death is in question has disappeared from his last known abode, domicile or residence; (2) that he has neither returned thereto nor communicated with those with whom he would naturally communicate, if living; and (3) that inquiry had been made at the last known place of abode of the persons who would naturally hear from him, without obtaining information that he is alive. (Harrell v. Equitable Life Ins. Co., 260 Ill. App. 370; Ellis v. Coleman, 170 Ill. 60; Polkemmer's Gen. Ass'n v. Hyde, 213 Ill. 9.) Out of proof of such material facts the presumption of death arises as a matter of law which may be rebutted or disproved by evidence of facts tending to show that the party presumed to be dead is alive.

In order to bring the case within the prerequisites laid down by the established rule in this state plaintiff adduced evidence to show Kerrigan's unexplained disappearance from his last known abode in August, 1928. Numerous witnesses who knew him testified that they had not seen him since he resided at the home of plaintiff, his sister, during that year. Some of the witnesses said that they had made inquiries of friends and people who knew Kerrigan, concerning his whereabouts. Defendant stresses the fact that Kerrigan went to reside with his brother, after leaving plaintiff's home in August, 1928; that therefore the home of his brother was his last known place of abode, and that there is no evidence to prove that he disappeared from his brother's home. It appears from the record, however, that he left

established residence of the insured was the home of plaintiff, and that although arrangements had been made for Kerrigan to reside with his brother temporarily during plaintiff's absence in Michigan on a vacation, his residence was nevertheless with plaintiff, his sister.

Defendant does not contend that the insured has returned or that anyone has seen or heard from him since his disappearance, and in fact it is clearly established by the testimony of several witnesses that the insured has not communicated with any of his friends or brothers and sisters, or other relatives, with some of whom he would naturally have communicated, if he were alive. Plaintiff and her brother, Kerrigan, were on good terms. He had lived at her home for long periods of time, and there is no one who would have been more likely to have heard from him if he were alive, than plaintiff.

Plaintiff testified that she and other relatives and friends had made inquiries concerning the whereabouts of Kerrigan in places that he had frequented and tried to get information about him at the bureau of missing persons, but to no avail. Defendant, when notified of plaintiff's claim, sent an investigator to insured's last known abode, and he also made inquiries concerning the whereabouts of insured. None of the inquiries by either plaintiff, relatives or friends, or by defendant's investigator, have resulted in obtaining any information as to his whereabouts. Ample time and opportunity was given defendant to rebut or disprove the presumption of Kerrigan's death if it were possible to do so, but no evidence whatsoever was introduced that would tend to account for his disappearance or to show that he is still alive. Under the circumstances we think the presumption of death as a matter of law was sufficiently established by evidence adduced upon the hearing to support the judgment rendered.

The only other point involved relates to the assignment of cross-errors by plaintiff for the taxation of attorney's fees because of the delay in paying the benefits under the policy. The section

established residence of the insured was the home of plaintiff, and that although arrangements had been made for Kerrigan to reside with his brother temporarily during plaintiff's absence in Michigan as a vacation, the residence was never changed with plaintiff's consent.

Defendant does not contend that the insured has returned or that anyone has seen or heard from him since his disappearance, and in fact it is clearly established by the testimony of several witnesses that the insured has not communicated with any of his friends or brethren and sisters, or other relatives, with some of whom he would naturally have communicated, if he were alive. Plaintiff and her brother, Kerrigan, were on good terms. He had lived at her home for long periods of time, and there is no one who would have been more likely to have heard from him if he were alive, than plaintiff.

Plaintiff testified that she and other relatives and friends had made inquiries concerning the whereabouts of Kerrigan in places that he had frequented and tried to get information about him at the houses of missing persons, but to no avail. Defendant, when notified of plaintiff's claim, sent an investigator to insured's last known abode, and he also made inquiries concerning the whereabouts of insured. None of the inquiries by either plaintiff, relatives or friends, or by defendant's investigator, have resulted in obtaining any information as to his whereabouts. Ample time and opportunity was given defendant to rebut or disprove the presumption of Kerrigan's death if it were possible to do so, but no evidence whatsoever was introduced that would tend to account for his disappearance or to show that he is still alive. Under the circumstances we think the presumption of death as a matter of law was sufficiently established by evidence adduced upon the hearing to support the judgment rendered.

The only other point involved relates to the assignment of cross-error by plaintiff for the taxation of attorney's fees because of the delay in paying the benefits under the policy. The evidence

of the statute invoked (chapter 73, section 767, Ill. Rev. Stats. 1939) provides that the court may allow reasonable attorney's fees only if it appears that the refusal to pay is vexatious and without reasonable cause. The trial court found that there was a disputed issue of fact and that defendant's refusal was therefore justified, and we are not disposed to disturb that finding.

The judgment of the Municipal court is affirmed and the claim for attorney's fees under the assignment of cross-errors is denied.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

of the statute insofar (chapter 73, section 1[1], 111. Ann. Stats. 1920) provides that the court may allow reasonable attorney's fees only if it appears that the refusal to pay is vexatious and without reasonable cause. The trial court found that there was a dispute as to the facts and that defendant's refusal was therefore justified, and we are not disposed to disturb that finding.

The judgment of the municipal court is affirmed and the claim for attorney's fees under the assignment of mortgage is denied.

JUDGMENT AFFIRMED.

Gulliver, P. J., and Scanlan, J., concur.

40699

JOSEPH KRAMMER,
Appellee,

v.

A. L. MELTZER and
KRAMMER FUR COMPANY,
a corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued on a note payable to his order dated April 3, 1936, executed by defendant Krammer Fur Company, a corporation, and bearing the qualified indorsement of A. L. Meltzer, the other defendant. Meltzer disclaimed liability as indorser because of the absence of presentment for payment and notice of dishonor. Krammer Fur Company admitted its liability but interposed a counterclaim based on four specific items aggregating $3,360.12. The case was tried by the court without a jury resulting in findings against defendants, both on plaintiff's statement of claim and defendants' counterclaim, and judgment for plaintiff for $3,078.57, from which this appeal is taken.

For several years prior to 1935 plaintiff was the sole owner of a retail fur business at 36 South State street, Chicago, which was conducted by him under the name of Krammer Fur Company, not incorporated. In December, 1935, he filed a voluntary petition in bankruptcy in the United States District Court under section 74 of the Bankruptcy Act, and thereafter the business was operated under the jurisdiction of the court. In contemplation of a proposed composition settlement with his creditors to the extent of 60% of their claims plaintiff made a proposal to sell his assets to Meltzer, who was to organize an Illinois corporation under the name of Krammer Fur Company for the purpose of taking over all Krammer's assets and

40009

JOSEPH KRAMER,

Appellee,

v.

A. L. MELTZER and KRAMER FUR COMPANY, a corporation,

Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued on a note payable to his order dated April 3, 1936, executed by defendant Kramer Fur Company, a corporation, and bearing the qualified indorsement of A. L. Meltzer, the other defendant. Meltzer disclaimed liability as indorser because of the absence of presentment for payment and notice of dishonor. Kramer Fur Company admitted its liability but interposed a counterclaim based on four specific items aggregating $3,360.12. The case was tried by the court without a jury resulting in findings against defendants, both on plaintiff's statement of claim and defendants' counterclaim, and judgment for plaintiff for $1,078.17, from which this appeal is taken.

For several years prior to 1935 plaintiff was the sole owner of a retail fur business at 36 South State street, Chicago, which was conducted by him under the name of Kramer Fur Company, not incorporated. In December, 1935, he filed a voluntary petition in bankruptcy in the United States District Court under section 74 of the Bankruptcy Act, and thereafter the business was operated under the jurisdiction of the court. In contemplation of a proposed composition settlement with his creditors to the extent of 60% of their claims plaintiff made a proposal to sell his assets to Meltzer, who was to organize an Illinois corporation under the name of Kramer Fur Company for the purpose of taking over all Kramer's assets and

thereafter conducting the fur business as a corporate enterprise. Preliminary negotiations finally culminated in the execution of an agreement between plaintiff and Meltzer, which is the principal subject of controversy in this cause. Briefly summarized, plaintiff represented himself to be the sole owner of all the assets of the fur business theretofore conducted by him; that his books of account correctly reflected all his assets and liabilities, including liability to customers for merchandise purchased by them and undelivered; that title to all merchandise on the premises was vested in him, and that title to no part thereof had been retained by any vendor, nor was any of said merchandise delivered to him upon consignment or memorandum; that there were no pending suits or claims for damages against him, by reason of the conduct of his business, which were not actually reflected or entered in the books of account; that he had not theretofore sold or exhibited to any person, firm or corporation the list of customers of his business; and that he was not associated with any other individual, firm or corporation engaged in the retail fur business in Chicago.

Meltzer on his part agreed to organize an Illinois corporation known as Krammer Fur Company, with an authorized capitalization of 500 shares of common stock of no par value, of which 350 shares should be immediately issued and fully paid, in consideration of the transfer to the company of all the physical assets owned by plaintiff as set forth in the schedules filed by him in the U. S. District Court, with the exception of his personal effects. Plaintiff at the same time agreed to execute all necessary documents, including a bill of sale effectually conveying to the corporation good title to all his assets, including merchandise, equipment, cash, securities, accounts receivable, good will, trade name, customers' list and leasehold interest, and to comply with the provisions of the Illinois Bulk Sales Law, simultaneously with the deposit by Meltzer of moneys with the clerk of the U. S. District Court sufficient to effect a settlement with plaintiff's creditors for an amount not to exceed 60% of the liabilities listed in the schedules

thereafter conducting the fur business as a corporate enterprise. Preliminary negotiations finally culminated in the execution of an agreement between plaintiff and Meltzer, which is the principal subject of controversy in this cause. Briefly summarized, plaintiff represented himself to be the sole owner of all the assets of the fur business theretofore conducted by him; that his books of account correctly reflected all his assets and liabilities, including liability to customers for merchandise purchased by them and undelivered; that title to all merchandise on the premises was vested in him, and that title to no part thereof had been retained by any vendor, nor was any of said merchandise delivered to him upon consignment or memorandum; that there were no pending suits or claims for damages against him, by reason of the conduct of his business, which were not actually reflected or entered in the books of account; that he had not, therefore, sold or exhibited to any person, firm or corporation the list of customers of his business; and that he was not associated with any other individual, firm or corporation engaged in the retail fur business in Chicago.

Meltzer on his part agreed to organize an Illinois corporation known as Kramer Fur Company, with an authorized capitalization of 200 shares of common stock of no par value, of which 190 shares should be immediately issued and fully paid, in consideration of the transfer to the company of all the physical assets owned by plaintiff as set forth in the schedules filed by him in the U. S. District Court, with the exception of his personal effects. Plaintiff at the same time agreed to execute all necessary documents, including a bill of sale effectually conveying to the corporation good title to all his assets, including merchandise, equipment, cash, securities, accounts receivable, good will, trade name, customers' list and leasehold interest, and to comply with the provisions of the Illinois Bulk Sales Law, simultaneously with the deposit by Meltzer of money with the clerk of the U. S. District Court sufficient to effect a settlement with plaintiff's creditors for an amount not to exceed 60% of the liabilities listed in the schedules

theretofore filed by Krammer and reflected on his books, not including, however, any claim for unliquidated damages or damages accruing out of the indenture of lease dated April 17, 1935, for the premises occupied by Krammer, other than for actual use and occupation.

It was further agreed that Meltzer, through his attorney, should have the right to contest the validity of any preferred or general claim filed in the bankruptcy proceedings, or claim made by any of Krammer's creditors, provided arrangements should be made for the payment of such contested claim in the event of any adverse ruling or decision thereof. It was stipulated that in addition to the amount required to effect the composition settlement there should be included in Krammer's liabilities the usual and customary expenses for administration costs in the bankruptcy proceedings, not to exceed $5,000. Krammer on his part agreed to transfer to the clerk of the U. S. District Court all cash funds on hand and thereafter received by him through operation of the business under the supervision of the U. S. District Court for the purpose of effectuating the contemplated composition settlement. He also agreed to procure the deposit of acceptances by his creditors sufficient in number and amount to assure the confirmation of the composition settlement, together with waivers or receipts for all fees and costs allowed in the bankruptcy proceeding.

The agreement contained a provision that if in the judgment of Messrs. Blum and Jacobson, and Harold A. Fein, attorneys respectively for plaintiff and defendants, the pending proceedings in the U. S. District Court could be dismissed or withdrawn so as to effect a settlement with creditors upon the same terms as were contemplated by the agreement, without court proceedings, plaintiff would cause all cash on hand to be transferred to any person, firm or corporation designated by the respective counsel and to deliver all documents required to carry out the contemplated plan.

Upon the final confirmation of the composition settlement

therefore filed by Kramer and reflected on his books, not limiting, however, any claim for unliquidated damages or damages accruing out of the indenture of lease dated April 17, 1932, for the premises occupied by Kramer, other than for actual use and occupation.

It was further agreed that Meltzer, through his attorney, should have the right to contest the validity of any preferred or general claim filed in the bankruptcy proceedings, or claim made by any of Kramer's creditors, provided arrangements should be made for the payment of such contested claim in the event of any adverse ruling or decision thereof. It was stipulated that in addition to the amount required to effect the composition settlement there should be included in Kramer's liabilities the usual and customary expenses for administration costs in the bankruptcy proceedings, not to exceed $2,000. Kramer on his part agreed to transfer to the clerk of the U. S. District Court all cash funds on hand and thereafter received by him through operation of the business under the supervision of the U. S. District Court for the purpose of effectuating the contemplated composition settlement. He also agreed to procure the deposit of acceptances by his creditors sufficient in number and amount to assure the confirmation of the composition settlement, together with waivers or receipts for all fees and costs allowed in the bankruptcy proceeding.

The agreement contained a provision that if in the judgment of Messrs. Blum and Jacobson, and Harold A. Fein, attorneys respectively for plaintiff and defendants, the pending proceedings in the U. S. District Court could be dismissed or withdrawn so as to effect a settlement with creditors upon the same terms as were contemplated by the agreement, without court proceedings, plaintiff would cause all cash on hand to be transferred to any person, firm or corporation designated by the respective counsel and to deliver all documents required to carry out the contemplated plan.

Upon the final confirmation of the composition settlement

by order of court, or upon the final settlement with all creditors in the event the pending proceedings were withdrawn or dismissed, Meltzer agreed to pay forthwith to plaintiff $3,750 and to procure the execution and delivery by the corporation to be organized of its promissory note in the sum of $3,750, payable March 1, 1937, with interest at 4%, with the indorsement of Meltzer.

The agreement was dated February 28, 1936. Krammer receiver $3,750 in cash. Shortly before the execution of the note on April 3, 1936, defendant corporation paid plaintiff $500 on account of the remaining obligation of $3,750, and the note upon which this suit is predicated was consequently made in the amount of $3,250.

The time limit given Meltzer within which to accept plaintiff's original proposal was February 24, 1936. This was subsequently extended for two days, and finally on February 28th the parties met in the office of Harold A. Fein, counsel for defendants, to consummate the agreement. Present at this meeting, which convened at four o'clock in the afternoon and lasted until eleven o'clock in the evening, were Meltzer, Krammer, his attorney, A. M. Blum, Meyer Cohen, president of the Krammer Fur Company, one LaBrint, plaintiff's father-in-law, and Fein, representing Meltzer. The agreement was drawn and executed in duplicate. Under clause (b) of the first paragraph of the agreement, appearing on pages 2 and 3 thereof, which contains a representation by Krammer as to the total liabilities of the business and the extent of the preferred claims filed by him in the U. S. District Court, the amounts of the liabilities and of the preferred claims were left blank. These respective amounts were to be supplied from the schedules filed by Krammer in the U. S. District Court. Blum did not have copies of these schedules with him that night, however, and, the hour being late, the respective counsel agreed to fill in the blank spaces at a later date when the figures shown in the schedules became available. In the copy of the agreement delivered to Blum, the blank spaces were never filled. Fein, however, inserted in his copy the respective sums of $65,000 and $2,100.

by order of court, or upon the final settlement with all creditors in the event the pending proceedings were withdrawn or dismissed, Meltzer agreed to pay forthwith to plaintiff $3,750 and to procure the execution and delivery by the corporation to be organized of its promissory note in the sum of $3,750, payable March 1, 1937, with interest at 4%, with the indorsement of Meltzer.

The agreement was dated February 28, 1936. Kramer received $3,750 in cash. Shortly before the execution of the note on April 3, 1936, defendant corporation paid plaintiff $500 on account of the remaining obligation of $1,750, and the note upon which this suit is predicated was consequently made in the amount of $3,250.

The time limit given Meltzer within which to accept plaintiff's original proposal was February 24, 1936. This was subsequently extended for two days, and finally on February 28th the parties met in the office of Harold A. Fein, counsel for defendants, to consummate the agreement. Present at this meeting, which convened at four o'clock in the afternoon and lasted until eleven o'clock in the evening, were Meltzer, Kramer, his attorney, A. E. Sinn, Meyer Cohen, president of the Kramer Fur Company, one Martin, plaintiff's father-in-law, and Fein, representing Meltzer. The agreement was drawn and executed in duplicate. Under clause (b) of the first paragraph of the agreement, appearing on pages 2 and 3 thereof, which contains a representation by Kramer as to the total liabilities of the business and the extent of the preferred claims filed by him in the U. S. District Court, the amounts of the liabilities and of the preferred claims were left blank. These respective amounts were to be supplied from the schedules filed by Kramer in the U. S. District Court. Sinn did not have copies of these schedules with him that night, however, and, the hour being late, the respective counsel agreed to fill in the blank spaces at a later date when the figures shown in the schedules became available. In the copy of the agreement delivered to Sinn, the blank spaces were never filled. Fein, however, inserted in his copy the respective sums of $65,000 and $2,100.

When the cause came on for hearing plaintiff introduced in evidence the note for $3,250, which bore the following indorsement over Meltzer's signature: "Payment in accordance with agreement between A. L. Meltzer and Joseph Krammer." Plaintiff's counsel then offered in evidence as plaintiff's exhibit 2 his copy of the agreement. Defendants objected to its admission because, as they argued, the figures $65,000 and $2,100 were omitted on pages 2 and 3 of the agreement, but the court admitted the exhibit in evidence, saying, "This instrument, as it stands, is a complete, understandable instrument," and indicating that the respective amounts could readily be ascertained by referring "back to the schedule." The schedules, when consulted, clearly show that plaintiff's total liabilities aggregated $144,347.21, inclusive of preferred claims of approximately $7,000. This aggregate amount includes four general claims amounting to $72,373.80, made up as follows: Contingent liability on lease $47,865.54; customer's credit balances $3,120.51; advance collections and credits due customers on installment purchases $18,783.70; and collections and credits due customers for repair work undelivered $2,604.05. When the sum total of these unliquidated liabilities amounting to $72,373.80, plus the preferred claims of $7,000, are deducted from the aggregate figure of $144,347.21, it leaves approximately $65,000, indicating the basis for Fein's figures in his copy of the agreement. The record does not disclose how he arrived at the figure of $2,100, relating to the extent of the preferred claims.

After the court had admitted plaintiff's copy of the instrument in evidence defendants offered Meltzer's copy with the figures $65,000 and $2,100 which had been inserted by Fein. The court denied the offer, but permitted defendants to introduce in evidence certain letters and oral testimony, not for the purpose of varying the agreement, but as the court said for the purpose of showing the position of the parties "at the time that this contract was entered into."

When the cause came on for hearing plaintiff introduced in evidence the note for $1,270, which bore the following indorsement over Meltzer's signature: "Payment in accordance with agreement between A. L. Meltzer and Joseph Kramer." Plaintiff's counsel then offered in evidence as plaintiff's exhibit 2 his copy of the agreement. Defendants objected to its admission because, as they argued, the figures $65,000 and $2,100 were omitted on pages 2 and 3 of the agreement, but the court admitted the exhibit in evidence, saying, "This instrument, as it stands, is a complete, understandable instrument," and indicating that the respective amounts could readily be ascertained by referring "back to the schedule." The schedules, when consulted, clearly show that plaintiff's total liabilities aggregated $144,347.21, inclusive of preferred claims of approximately $7,000. This aggregate amount includes four general claims amounting to $72,373.80, made up as follows: Contingent liability on lease $47,865.54; customer's credit balances $3,180.21; advance collections and credits due customers on installment purchases $18,783.70; and collections and credits due customers for repair work undelivered $2,604.07. When the sum total of these unliquidated liabilities amounting to $72,373.80, plus the preferred claims of $7,000, are deducted from the aggregate figure of $144,347.21, it leaves approximately $65,000, indicating the basis for Kain's figures in his copy of the agreement. The record does not disclose how he arrived at the figure of $2,100, relating to the amount of the preferred claims.

After the court had admitted plaintiff's copy of the instrument in evidence defendants offered Meltzer's copy with the figures $65,000 and $2,100 which had been inserted by Kain. The court denied the offer, but permitted defendants to introduce in evidence certain letters and oral testimony, not for the purpose of varying the agreement, but as the court said for the purpose of showing the position of the parties "at the time that this contract was entered into."

The first of these was defendants' exhibit 2, being one of a series of letters which were preliminary to the final agreement. This letter was dictated by Mr. Fein and signed by plaintiff at Fein's request. Plaintiff said: "The liabilities to trade and general creditors are $65,000 ***. I propose that you furnish sufficient cash in addition to cash on hand and hereafter collected pending the bankruptcy proceedings, to effect a composition settlement of 60¢ on the dollar." Plaintiff's statement as to the amount of his liabilities to trade and general creditors was manifestly correct, because it was shown that claims in the bankruptcy court to trade and general creditors were allowed in the aggregate sum of $64,136.11, and these were the claims on which composition was to be effected at 60¢ on the dollar. Plaintiff's statement in this letter cannot be construed as intending to include preferred claims, because under the bankruptcy law there could be no composition on preferred claims, which are required to be paid in full.

Another document introduced in evidence was defendants' exhibit 3 A, also constituting part of the preliminary negotiations. In this letter, written by Mr. Fein to plaintiff February 24, 1936, he said: "In your proposal you represented that your total liabilities to trade and general creditors, not including February 1936 rent, was $65,000. The situation as disclosed by the schedules filed in the bankruptcy proceedings indicate that in addition to the liabilities of $65,000 there are liabilities as follows: 1. To the Lessor for the contingent liability under the lease, approximately $47,000." This item of $47,000 is one of four which aggregate $72,373.80 and when added to the total unsecured claims of $65,000 and preferred claims of some $7,000, constitute the figure of $144,347.21, which the court found as the correct amount that should have been inserted in the appropriate blank space on the written agreement.

From oral testimony adduced upon the hearing it appears that defendants did not become liable on the $47,000 item, because as

The first of these was defendants' exhibit 1, being one of a series of letters which were preliminary to the final agreement. This letter was dictated by Mr. Pain and signed by plaintiff at Pain's request. Plaintiff said: "The liabilities to trade and general creditors are $65,000 ***. I propose that you furnish sufficient cash in addition to cash on hand and receivables collected pending the bankruptcy proceedings, to effect a composition settlement of 50¢ on the dollar." Plaintiff's statement as to the amount of his liabilities to trade and general creditors was manifestly correct, because it was shown that claims in the bankruptcy court in trade and general creditors were allowed in the aggregate sum of $64,114.11, and there were the claims on which composition was to be offered at 50¢ on the dollar. Plaintiff's statement in this letter cannot be construed as intending to include preferred claims, because under the bankruptcy law there could be no composition on preferred claims, which are required to be paid in full.

Another document introduced in evidence was defendants' exhibit 3, also constituting part of the preliminary negotiations. In this letter, written by Mr. Pain to plaintiff February 24, 1926, he said: "In your proposal you represented that your total liabilities to trade and general creditors, not including February 1926 rent, was $65,000. The estimates as disclosed by the schedules filed in the bankruptcy proceedings indicate that in addition to the liabilities of $65,000 there are liabilities as follows: 1. On the lease for the contingent liability under the lease, approximately $47,000." This item of $47,000 is one of four which aggregate $72,373.50 and when added to the total unsecured claims of $65,000 and preferred claims of some $7,000, constitute the figure of $144,447.21, which the court found as the correct amount that should have been inserted in the appropriate blank space on the written agreement.

From oral testimony adduced upon the hearing it appears that defendants did not assume liability on the $47,000 item, because as

Meyer M. Cohen, one of defendants' witnesses, testified: "This entire transaction was predicated on our ability to complete an arrangement with the present landlords." When asked whether such arrangements were completed he responded in the affirmative. This is not disputed and the record indicates that the Krammer Fur Company, which was later incorporated, made satisfactory arrangements for a lease in the name of the corporation with the Central Realty Company, who were operating the building at 36 N. State street, thus disposing of this item.

Defendants place considerable emphasis on another document introduced in evidence as exhibit 4, which was a letter written by Blum to Fein March 5, 1936, purporting to confirm a conversation had between these attorneys with reference to the amounts to be inserted in the agreement. Fein testified that in this conversation he had advised Blum that he would insert the figures $65,000 and $2,100. Blum denied that any such figures were mentioned. Nowhere in the letter does Blum mention either $65,000 or $2,100. He merely says:

"Upon the execution of the agreement between Joseph Krammer and A. L. Meltzer, we neglected to insert in the spaces provided for on Pages 2 and 3 of the agreement the amount of the liabilities which were represented by Mr. Krammer as being due to creditors.

"This will confirm our arrangement that the total liabilities as shown in the schedule for which the composition settlement will be made, does not include the following items:

"Contingent Liability to the Central Realty Company as shown $47,865.54

"Customers' Credit Balances 3,120.51

"Advance Collections and credits due customers for installment purchases 18,783.70

"Collections and credits due customers for repair work undelivered 2,604.05

"This will not affect any obligation on the part of the new corporation, Krammer Fur Company to assume any liability as may be shown on the books of Joseph Krammer, as of the date of your examination, to customers for credit balances, advance collections and credits for repair work."

If it had been Blum's understanding, as Fein contends, that the items of $65,000 and $2,100 should have been inserted in the blank spaces, it would have been a simple matter for him to have mentioned these amounts in his letter in confirmation of the telephone conver-

Meyer K. Cohen, one of defendant's witnesses, testified: "This entire transaction was predicated on our ability to complete an arrangement with the present landlords." When asked whether such arrangements were completed he responded in the affirmative. This is not disputed and the record indicates that the Kramer Fur Company, which was later incorporated, made satisfactory arrangements for a lease in the name of the corporation with the Central Realty Company, who were operating the building at 36 W. State street, thus disposing of this item.

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"Upon the execution of the agreement between Joseph Kramer and A. E. Kelleter, we negotiated to insert in the space provided for on Pages 2 and 3 of the agreement the amount of the liabilities which were represented by Mr. Kramer as being due to creditors.

"This will confirm our arrangement that the total liabilities as shown in the schedule for which the compromise settlement will be made, does not include the following items:

"Contingent liability to the Central Realty Company as shown $47,000.00

"Customers' Credit Balances 3,120.71

"Advance Collections and credits due customers for installment purchases 10,720.70

"Collections and credits due customers for repair work undelivered 3,104.05

"This will not effect any obligation on the part of the New corporation, Kramer Fur Company to assume any liability as may be shown on the books of Joseph Kramer, as of the date of your execution, to customers for credit balances, advance collections and credits for repair work."

If it had been Blum's understanding, as Fein contends, that the items of $65,000 and $2,100 should have been inserted in the blank spaces, it would have been a simple matter for him to have mentioned these amounts in his letter in confirmation of the telephone conver-

sation with Fein. However, instead of confirming or mentioning these figures Blum specifically said that the total liabilities for which the composition settlement would be made did not include the four items enumerated which aggregate some $72,000. It is fairly clear that the composition settlement was to be made at 60% on the unsecured claims, and this is corroborated by the order of composition entered in the U. S. District Court. The query arises, therefore, as to what should become of the four items which Blum's letter said were not to be included in the composition. The answer lies in that portion of the letter which says, "This will not affect any obligation on the part of the new corporation *** to assume any liability as may be shown on the books of Joseph Krammer, as of the date of your examination ***." This statement in Blum's letter is likewise corroborated by the composition order entered in the U. S. District Court, which provides for the organization of a corporation "to assume the contingent and/or unliquidated liabilities to Central Realty Company, customers' credit balances, advance collections or credits due customers on installment purchases, and collections and credits due customers for repair work undelivered." In other words, we think that Blum's letter supports plaintiff's contention that the composition at 60¢ on the dollar was to be made only as to trade and general creditors having liquidated claims. These were represented by plaintiff to be not in excess of $65,000, and the evidence clearly shows that unsecured, liquidated claims were filed and allowed to trade and general creditors in the sum of $64,136.11, thus rendering plaintiff's representations substantially accurate. Of the various witnesses who testified Mr. Fein was the only one who said that there was an agreement to insert the figures $65,000 and $2,100 in the contract. Other evidence substantiates plaintiff's contention that the parties intended to insert the figures shown in the schedules, namely, total liabilities of $144,347.21, including preferred claims of $7,032.58. No explanation is offered as to the $2,100 item. However, it is unreasonable to suppose that after scheduling preferred claims in the U. S. District Court in excess of $7,000 plaintiff would have made a representation

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to Meltzer that the preferred claims did not exceed $2,100.

Of the four items hereinbefore enumerated aggregating some $72,000 the first item of $47,000, the rent claim, was settled with the landlord, and the other three were assumed by the corporation. These are the four items for which Blum's letter said "composition was not to be made;" and it was not to be made because they were not liquidated claims. Plaintiff's counsel point out as significant the testimony of Meyer M. Cohen called as a witness by defendants. He had been associated with Meltzer and was made president of the newly organized corporation, Krammer Fur Company. He testified that the contracts were signed about eleven p.m., and that the figures were not inserted on pages 2 and 3; that the parties could not determine the amounts to be inserted because they did not know the precise figures, and said: "I brought up the point to Meltzer that we should have the figure in to limit the payment to creditors to $39,000. I specifically made that point. The answer was that we couldn't insert an actual figure because no one, at that time could determine the exact obligation that Krammer Fur Co. owed and <u>only when we got the schedules</u> from court we would be able to have actual figures. Either Meltzer, Fein or myself said that <u>this figure of $65,000 that we were talking about, General creditors, did not include the rent obligation</u> and that if we found that a figure was disclosed later that would affect these figures we would change the figures accordingly." (Italics ours.) Plaintiff's counsel points out, and we think with considerable effect, that the figure $39,000 mentioned by Cohen happens to be exactly 60% of $65,000, and that $65,000 is the approximate amount of general claims shown on the schedules for which composition at 60% was to be made.

The ultimate question, of course, is to determine whether plaintiff's exhibit 1, which was received in evidence, or defendants' exhibit 2, which was excluded, represented the agreement of the parties. The trial court admitted plaintiff's copy of the contract

to Meltzer that the preferred claims did not exceed $2,100.

Of the four items heretofore considered separately, $72,000 the first item of $47,000, the rent claim, was settled with the landlord, and the other three were assumed by the corporation. These are the four items for which Blum's letter said "composition was not to be made;" and it was not to be made because they were not liquidated claims. Plaintiff's counsel point out as significant the testimony of Meyer M. Cohen called as a witness by defendants. He had been associated with Meltzer and was made president of the newly organized corporation, Kramer Fur Company. He testified that the contracts were signed about eleven p.m., and that the figures were not inserted on pages 2 and 3; that the parties could not determine the amounts to be inserted because they did not know the precise figures, and said: "I brought up the point to Meltzer that we should have the figure in to limit the payment to creditors to $39,000. I specifically made that point. The answer was that we couldn't insert an actual figure because no one, at that time could determine the exact obligation that Kramer Fur Co. owed and only when we got the schedules from court we would be able to have actual figures. Either Meltzer, Pain or myself said that this figure of $65,000 that we were talking about, General creditors, did not include the rent obligation and that if we found that a figure was disclosed later that would affect these figures we would change the figures accordingly." (Italics ours.) Plaintiff's counsel points out, and we think with considerable effect, that the figure $39,000 mentioned by Cohen happens to be exactly 60% of $65,000, and that $65,000 is the approximate amount of general claims shown on the schedules for which composition at 60% was to be made.

The ultimate question, of course, is to determine whether plaintiff's exhibit 1, which was received in evidence, or defendants' exhibit 2, which was excluded, represented the agreement of the parties. The trial court admitted plaintiff's copy of the contract

and it therefore became incumbent upon defendants to prove that that was not the agreement of the parties. In order to accomplish this defendants introduced the various letters and documents hereinbefore referred to, but an examination and analysis of these letters, etc., convinces us that defendants did not meet the burden thus cast upon them, and that plaintiff's contention that the respective amounts of $144,347.21 and $7,032.58 were the correct figures to be read into the contract in the spaces left blank for that purpose. This view, adopted by the trial court, seems to be in harmony with the letter of the agreement and is sustained by reference to the bankruptcy schedules as representing the clear intent of the parties.

Based upon the differences between the figures adopted by the court and those for which defendant corporation is contending, it is argued that defendants paid an excess of claims above the maximum to the extent of $3,115.44, for which it is entitled to be reimbursed under clause 8 of the agreement, which contains the following provision:

"In the event any claims shall be made, prior to March 1, 1937, by reason of any liability or act of the party of the first part which may become or ripen into a lien on the property or assets transferred to the Company by the party of the first part, or which the Company or the party of the second part may become liable for by reason of the failure of the party of the first part to perform any of the covenants of this agreement, or by reason of any representations made by the party of the first part, or by reason of the failure of the party of the first part to make full disclosure thereof to the party of the second part or the Company, such claims or liabilities may be offset and deducted by the Company and the party of the second part from the amount due upon said promissory note, not including, however, any claim or liabilities disclosed in the schedules in bankruptcy heretofore filed in the United States District Court by the party of the first part, and except any claim or liability which may be classified and designated as a 'customer's adjustment' to be made in the ordinary course of business."

This item was disallowed in its entirety by the court with the following comment: "I am going to follow the same theory I had in the beginning of the case, and that is that the contract as it was admitted and as I would interpret it is governed by the schedules as filed, the schedules which were filed at the time the contract was entered into, and therefore as far as any excess of claims above the maximum, I will not allow anything. Because, I do not think under the contract as I see it there should be any excess of claims

and it therefore became incumbent upon defendants to prove that that was not the agreement of the parties. In order to accomplish this defendants introduced the various letters and documents hereinbefore referred to, but an examination and analysis of these letters, etc., convinces us that defendants did not meet the burden thus cast upon them, and that plaintiff's contention that the respective amounts of $144,347.21 and $7,032.38 were the correct figures to be read into the contract in the spaces left blank for that purpose. This view, adopted by the trial court, seems to be in harmony with the letter of the agreement and is sustained by reference to the bankruptcy schedules as representing the clear intent of the parties.

Based upon the differences between the figures adopted by the court and those for which defendant corporation is contending, it is argued that defendants paid an excess of claims above the maximum to the extent of $3,117.44, for which it is entitled to be reimbursed under clause 6 of the agreement, which contains the following provisions:

"In the event any claims shall be made, prior to March 1, 1917, by reason of any liability or act of the party of the first part which may become or claim to be a lien on the property or assets transferred to the company by the party of the first part, or which the company or the party of the second part may become liable for by reason of the failure of the party of the first part to make full disclosure thereof to the party of the second part or the company, such claims or liabilities may be offset and deducted by the company and the party of the second part from the amount due upon said promissory note, not including, however, any claim or liability disclosed in the schedules in bankruptcy proceeds fore filed in the United States District Court by the party of the first part, and except any claim or liability which may be classified and designated as a 'customer's adjustment' to be made in the ordinary course of business."

This item was disallowed in its entirety by the court with the following comment: "I am going to follow the same theory I had in the beginning of the case, and that is that the contract as it was admitted and as I would interpret it is governed by the schedules as filed, the schedules which were filed at the time the contract was entered into, and therefore as far as any excess of claims above the maximum, I will not allow anything. Because, I do not think under the contract as I see it there should be any excess of claims

allowed."

On oral argument plaintiff's counsel left with us a summary of figures showing that instead of having paid $3,115.44 in excess of claims defendants actually paid less by $3,478.48. This aggregate sum is made up as follows: The schedule listed preferred claims not to exceed $7,032.58. Defendants actually paid only $3,979.33 or a saving of $3,053.25. In addition thereto a saving of $425.23 was effected on the unsecured claims actually paid by the corporation.

The three other items presented under the counterclaim may be briefly disposed of as follows: One, the sum of $524.59, was allowed by the court for excess of administration fees stipulated in the agreement. This item is clearly covered in the contract and was properly allowed. Another item of $262.50 for legal services rendered by Mr. Fein in contesting the claim of the department of finance against the corporation was disallowed. On oral argument Fein practically withdrew his claim to this fee and judgment on the counterclaim should therefore be affirmed in this regard. The remaining item amounting to $68.54 was disallowed by the court without assigning any reason therefor. It relates to a payment made to Spak & Natovich, who held a conditional sales contract executed by plaintiff on personal property, for which a reclamation petition was filed in the bankruptcy proceedings. Proof of the amount paid to the creditor was not in dispute and we think defendants are entitled to be reimbursed therefor. Judgment on the counterclaim is accordingly reversed to this extent.

There remains only a consideration of Meltzer's personal defense. He takes the position that since he was an indorser plaintiff was required to prove presentment of the note for payment and notice of dishonor. It was conceded by Mr. Fein on oral argument, however, that if the record sustains the contention that Meltzer was the accommodated party proof of presentment and notice of dishonor would not be necessary, since under Section 80 of the Negotiable Instruments Law (Ill. Rev. Stats. 1939, chap. 98, par. 102) "presentment for payment is not required to charge an indorser where the

allowed."

The trial argument plaintiff's counsel left with us a memory of figures showing that instead of having paid $1,117.44 in excess of claims defendants actually paid less by $3,478.48. This aggregate sum is made up as follows: The schedule listed preferred claims not to exceed $7,032.58. Defendants actually paid only $3,277.33 or a saving of $3,755.25. In addition there was a saving of $417.07 was effected on the unsecured claims actually paid by the corporation.

The three other items presented under the counterclaim may be briefly disposed of as follows: One, the sum of $724.79, was allowed by the court for excess of administration fees stipulated in the agreement. This item is clearly covered in the contract and was properly allowed. Another item of $202.50 for legal services rendered by Mr. Fein in contesting the claim of the department of finance against the corporation was disallowed. On oral argument Fein practically withdrew his claim to this fee and judgment on the counterclaim should therefore be affirmed in this regard. The remaining item amounting to $50.34 was disallowed by the court without assigning any reason therefor. It relates to a payment made to Spaulding for a conditional sales contract assumed by plaintiff as personal property. For which a reclamation petition was filed in the bankruptcy proceedings. Proof of the amount paid to the creditor was not in dispute and we think defendants are entitled to be reimbursed therefor. Judgment on the counterclaim is accordingly reversed to this extent.

There remains only a consideration of Meltzer's personal defense. He takes the position that since he was an indorser plaintiff was required to prove presentment of the note for payment and notice of dishonor. It was conceded by Mr. Fein on oral argument, however, that if the record sustains the contention that Meltzer was the accommodated party proof of presentment and notice of dishonor would not be necessary. Since under Article III of the Negotiable Instruments Law (III. Rev. Stats. 1937, chap. 98, par. 102) "presentment for payment is not required to charge an indorser where the

instrument was made or accepted for his accommodation." There is abundant evidence in the record to show that the note sued upon in this case was made for Meltzer's accommodation. The contract itself so indicates. Moreover, Meltzer's own testimony shows that the note was executed by the corporation at his order and indorsed by him to fulfill his contractual obligation to plaintiff. The court recognized these circumstances and announced its decision as to this question by saying, "I think certainly he is the accommodated party, so that the judgment will be against A. L. Meltzer and Krammer Fur Company for the amount of the note plus interest, which will be $3,603.16."

From the amount of the judgment awarded plaintiff, $3,078.57, there should be deducted the sum of $68.54, which was disallowed defendant Krammer Fur Company on its counterclaim by the trial court, but is here allowed. With this modification plaintiff's judgment should be $3,010.03. The judgment of the Municipal court is reversed, and judgment is entered here in favor of plaintiff and against defendants in the sum of $3,010.03.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF AND AGAINST DEFENDANTS IN THE SUM OF $3,010.03.

Sullivan, P. J., and Scanlan, J., concur.

instrument was made or accepted for his accommodation." There is abundant evidence in the record to show that the note sued upon in this case was made for Meltzer's accommodation. The contract itself so indicates. Moreover, Meltzer's own testimony shows that the note was executed by the corporation at his order and indorsed by him to fulfill his contractual obligation to plaintiff. The court recognized these circumstances and announced its decision as to this question by saying, "I think certainly he is the accommodated party, so that the judgment will be against A. L. Meltzer and Kramer Fur Company for the amount of the note plus interest, which will be $3,903.16."

From the amount of the judgment awarded plaintiff, $3,076.37, there should be deducted the sum of $66.34, which was disallowed defendant Kramer Fur Company on its counterclaim by the trial court, but is here allowed. With this modification plaintiff's judgment should be $3,010.03. The judgment of the municipal court is reversed, and judgment is entered here in favor of plaintiff and against defendants in the sum of $3,010.03.

PLAINTIFF AND ADMIRAL INSURANCE IS THE SUM OF $3,010.03.

Sullivan, P. J., and Scanlan, J., concur.

304 Ill. App.

40720

NICHOLAS MERENKOW, administrator of the estate of John Merenkow, deceased,
Appellant,

v.

GUY A. RICHARDSON and WALTER J. CUMMINGS, as receivers of CHICAGO RAILWAYS COMPANY, a corporation, et al., doing business as CHICAGO SURFACE LINES, and JOHN H. WALKER,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

304 I.A. 577

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estate of John Merenkow, deceased, brought suit to recover damages for the death of his intestate, resulting from a collision with a bus driven by defendant John H. Walker, for and on behalf of the other defendants as receivers for the Chicago Surface Lines. Judgment was entered on the verdict of the jury finding the defendants not guilty, from which plaintiff has taken an appeal.

The accident occurred February 4, 1937, shortly after nine o'clock in the evening. Deceased, then 56 years of age, had visited some friends in the vicinity of the accident where he met one John Kedrick, the only eyewitness to the accident. About nine o'clock deceased and Kedrick proceeded south to Diversey avenue. They crossed to the south side of the street and started to walk east toward the stopping place of the bus at Natchez avenue. The neighborhood is sparsely populated, there being no sidewalk along the paved highway. When they reached the south side of Diversey avenue, Kedrick looked to the west and saw the bus standing about two blocks away. It was lighted in front as well as on the inside. He testified further that he did not see deceased turn to look at the bus at any time. In order to board the bus it was necessary for Kedrick and deceased to walk to the

40723

RICHARD MEYNEROV, administrator of the estate of John Meyerson, deceased,

Appellant,

v.

GUY A. RICHARDSON and WALTER J. GUSTINCIC, as receivers of CHICAGO RAILWAYS COMPANY, a corporation, et al., doing business as CHICAGO SURFACE LINES, and JOHN E. WALKER,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

304 I.A. 277

MR. JUSTICE PRINDIVILLE DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the estate of John Meyerson, deceased, brought suit to recover damages for the death of his intestate, resulting from a collision with a bus driven by defendant John E. Walker, for and on behalf of the other defendants as receivers for the Chicago Surface Lines. Judgment was entered on the verdict of the jury finding the defendants not guilty, from which plaintiff has taken an appeal.

The accident occurred February 4, 1937, shortly after nine o'clock in the evening. Deceased, then 56 years of age, had visited some friends in the vicinity of the accident where he met one John Kedrick, the only eyewitness to the accident. About nine o'clock deceased and Kedrick proceeded south to Diversey avenue. They crossed to the south side of the street and started to walk east toward the stopping place of the bus at Mathison avenue. The neighborhood is sparsely populated, there being no sidewalk along the paved highway. When they reached the south side of Diversey avenue, Kedrick looked to the west and saw the bus standing about two blocks away. It was lighted in front as well as on the inside. He testified further that he did not see deceased turn to look at the bus at any time. In order to board the bus it was necessary for Kedrick and deceased to walk to the

next stopping place, one block east. Kedrick walked south of the curb, where the sidewalk should have been, and the deceased walked in the street, about a step north of the curb. As the bus approached both men commenced running toward the intersection at Natchez avenue. At first deceased was even with, or a little ahead of, Kedrick, until just before the accident. Kedrick stated that "I first knew something happened when Merenkow fell in front of my feet." Deceased was evidently struck by the bus and thrown to the grass plot at about the length of the bus before it came to a stop at the intersection. Kedrick said that he did not see deceased come in contact with the bus; that "it happened monetarily;" and that the first he knew of the accident was when Merenkow fell in front of him on the grass plot just south of the curb. The record discloses that there were no street lights on the south side of Diversey avenue, and only one small light on the opposite side of the street. The bus had no passengers, the only person therein being John H. Walker, the driver. There were no other vehicles on the street, nor any other persons in the immediate vicinity when the accident occurred. The only other witness was Frank McBride, a police officer, who had been on duty in a squad car and received word by radio to proceed to the site of the accident and arrived there some time thereafter. He testified that the bus was lighted, but was unable to furnish any material evidence as to the manner in which the accident occurred.

Following Kedrick's testimony defendant Walker was called as a witness on behalf of defendants. After stating his name, address and occupation, plaintiff's counsel objected to further testimony on the ground that the witness was disqualified under section 2 of the Evidence Act (chap. 51, Ill. Rev. Stats. 1939). The court sustained the objection, whereupon counsel for defendants asked leave to call him on behalf of his codefendants, the Chicago Surface Lines. This was also objected to, and the objection sustained.

The principal ground urged for reversal is predicated upon

next stopping place, one block east. Kedrick walked south of the curb, where the sidewalk should have been, and the deceased walked in the street, about a step north of the curb. As the bus approached both were observed running toward the intersection at Western avenue. At first deceased was even with, or a little ahead of, Kedrick, until just before the accident. Kedrick stated that "I first knew something happened when Moremkow fell in front of my feet." Deceased was evidently struck by the bus and thrown to the grass plot at about the length of the bus before it came to a stop at the intersection. Kedrick said that he did not see deceased come in contact with the bus; that "it happened momentarily;" and that the first he knew of the accident was when Moremkow fell in front of him on the grass plot just south of the curb. The record discloses that there were no street lights on the south side of Diversey avenue, and only one small light on the opposite side of the street. The bus had no passengers, the only persons therein being Jim a, walker, the driver. There were no other vehicles on the street, nor any other persons in the immediate vicinity when the accident occurred. The only other witness was Frank McBride, a police officer, who had been on duty in a squad car and received word by radio to proceed to the site of the accident and arrived there some time thereafter. He testified that the bus was lighted, but was unable to furnish any material evidence as to the manner in which the accident occurred.

Following Kedrick's testimony defendant Walker was called as a witness on behalf of defendants. After stating his name, address and occupation, plaintiff's counsel objected to further testimony on the ground that the witness was disqualified under section 2 of the Evidence Act (chap. 51, Ill. Rev. Stats. 1939). The court sustained the objection, whereupon counsel for defendants asked leave to call him on behalf of his co-defendants, the Chicago Surface Lines. This was also objected to, and the objection sustained.

The principal ground urged for reversal is prejudicial error

the statements made by counsel for defendants in his argument to the jury with reference to the exclusion of Walker as a witness. Excerpts taken from the record disclose portions of the objectionable argument, as follows:

> "Why does he sue John Walker in this case? He must have a reason for it. That is within their own control. *** We have a right to assume the reason why John Walker, with his own property, who is sitting here as a defendant, and he is asking you to take his money away from him. *** He either didn't want him to testify or wanted to take his property and have you help him to do it without giving him an opportunity to be heard. The law is not a bag of tricks, gentlemen, it is plain common sense - and when you so present a verdict in this case about finding the defendant guilty, I want you to bear in mind, that takes John Walker's property too, and if that is not his reason for suing, it must be because the Surface Lines is in the hands of a receiver and they couldn't take out any execution against them, but could against John Walker, who merely works for them for a living. *** He walked up on the witness stand and was anxious that you might have his story under oath and was denied the right to give it up here. I am arguing on their evidence that he alone, he was guilty."

We quite agree with counsel for plaintiff that this argument was improper, and if the case were at all close on the evidence we should not hesitate in concluding that it constituted reversible error, for which plaintiff would be entitled to another trial. However, after a careful reading of the record, we have reached the conclusion that the jury could not have found otherwise than in favor of defendants. Plaintiff's contention that the verdict and judgment are contrary to and not sustained by the evidence is not supported by the record. The testimony of the only eyewitness discloses that deceased was running in the street toward the stopping place, indicating that he knew that the bus was close behind. There is no evidence that he looked or made any attempt to learn whether it was safe to run in the street at that time. The record is silent as to what deceased did, if anything, in the exercise of care for his own safety, or what the operator of the bus did or failed to do just before and at the time of the impact, which may have caused the accident. Neither is there any evidence as to what either party did in attempting to avert the collision. All of these controlling facts are left to conjecture and speculation. For aught that appears in the record, plaintiff may have veered in front of the bus, or

the statements made by counsel for defendants in his argument to the jury with reference to the examination of Walker as a witness. Excerpts taken from the record disclose portions of the objectionable argument, as follows:

"Why does he sue John Walker in this case? It just was a reason for it. That is within their own control. *** We have a right to assume the reason why John Walker, with his own property, who is sitting here as a defendant, and he is asking you to take his money away from him. *** He either didn't want the beauty or wanted to take his property and have you help him do it without giving him an opportunity to be heard. He is not a bag of tricks, gentlemen, it is John Walker - and when you so present a verdict in this case about finding the defendant guilty, I want you to bear in mind, that takes John Walker's property too, and if that is not his reason for suing, it must be because the surface lease is in the hands of a receiver and they couldn't take out any exemption against them, but could against John Walker, who merely works for them for a living. *** He walked up on the witness stand and was asked that you might take his story under oath and was denied the right to give it to them. I am arguing on their evidence that he alone, he was guilty."

We quite agree with counsel for plaintiff that this argument was improper, and if the case were at all close on the evidence we should not hesitate in concluding that it constituted reversible error, for which plaintiff would be entitled to another trial. However, after a careful reading of the record, we have reached the conclusion that the jury could not have found otherwise than in favor of defendants. Plaintiff's contention that the verdict and judgment are contrary to and not sustained by the evidence is not supported by the record. The testimony of the only eyewitness disclosed that deceased was running in the street toward the stopping place, indicating that he knew that the bus was close behind. There is no evidence that he looked or made any attempt to learn whether it was safe to run in the street at that time. The record is silent as to what deceased did, if anything, in the exercise of care for his own safety, or what the operator of the bus did or failed to do just before and at the time of the impact, which may have caused the accident. Neither is there any evidence as to what either party did in attempting to avert the collision. All of these controlling facts are left to conjecture and speculation. For aught that appears in the record, plaintiff may have veered in front of the bus, or

stumbled; no one knows how it happened. Under the law of this state a jury would not be warranted in basing a verdict for plaintiff upon the scant evidence presented. (Huff v. Illinois Central R. R. Co., 362 Ill. 95, 101.)

For the reasons given the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

abundant) no one knows how it happened. Under the law of 3d, this A jury would not be warranted in basing a verdict for plaintiff upon the mere evidence presented. (Hart v. Illinois Central R. R. Co., 326 Ill. 97, 101.)

For the reasons given the judgment of the circuit court is affirmed.

DAMAGES AFFIRMED.

Sullivan, P. J., and Dunlap, J., concur.

304 Ill. App.

41155

RAY BRANDT, doing business as BRANDT DAIRY, Plaintiff and Appellee, v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL 721, a voluntary unincorporated association, et al., Defendants, and DAIRY EMPLOYEES UNION, LOCAL 754, a voluntary unincorporated association, et al., Defendants and Appellants, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL 301, a voluntary unincorporated association, et al., Defendants and Appellants.	INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.

304 I.A. 578

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Ray Brandt, trading as Brandt Dairy, a processor and vendor of milk products, filed a complaint in the Circuit court against four defendant labor unions and certain individuals, seeking an injunction restraining defendants, their officers, agents and representatives from carrying on certain practices alleged to have been prejudicial, unlawful and constituting an interference with plaintiff's business. Plaintiff, pursuant to notice served the day before, appeared before the chancellor on the morning suit was filed on a motion for a restraining order. Counsel representing defendant unions appeared in court for the limited purpose of objecting to and resisting the issuance of a temporary restraining order and asked for time within which to file pleadings by way of defense. The court denied this request and without reading the verified complaint,

MAY BRANDT, doing business as BRANDT DAIRY, Plaintiff and Appellee,	
v.	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL 301, a voluntary unincorporated association, et al., Defendants,	
and	
DAIRY EMPLOYEES UNION, LOCAL 754, a voluntary unincorporated association, et al., Defendants and Appellants,	
and	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL 301, a voluntary unincorporated association, et al., Defendants and Appellants,	

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

804 I.A. 578

MR. JUSTICE PRIMMER DELIVERED THE OPINION OF THE COURT.

May Brandt, trading as Brandt Dairy, a processor and vendor of milk products, filed a complaint in the Circuit court against four defendant labor unions and certain individuals, seeking an injunction restraining defendants, their officers, agents and representatives from carrying on certain practices alleged to have been predatory, unlawful and constituting an interference with plaintiff's business. Plaintiff, pursuant to notice served the day before, appeared before the chancellor on the morning suit was filed on a restraining order. Counsel representing defendant unions appeared in court for the limited purpose of objecting to and resisting the issuance of a temporary restraining order and asked for time within which to file pleadings by way of defense. The court denied this request and without reading the verified complaint, a motion for

or having anyone read it to him or point out the material allegations thereof, announced "I am now choosing to hear some evidence." Counsel for defendants thereupon again called the court's attention to the fact that he had requested additional time, but the court said, "Well, I'll see if I will give it to you," and thereupon proceeded to hear the testimony of plaintiff, who related the alleged conduct of defendants' agents on two separate occasions, which purported to show certain unlawful acts, intimidations and interference with plaintiff's business. After plaintiff had testified and had been cross-examined, defendants' counsel asked for leave to rebut the evidence adduced before the court, but the chancellor said that he was too busy with other court matters, that it was merely a preliminary hearing in support of the motion for a temporary restraining order, and that defendants might the next day or at any subsequent time move for a dissolution of the injunction. At the conclusion of the hearing the court indicated that he would issue a temporary injunction and the order was then presented to him. It enumerated thirteen separate items or acts, from which defendants were sought to be restrained. After considering the order briefly the court announced that he would restrain defendants from doing only six of the acts specified, and suggested that counsel proceed to the jury room for a conference and select the six items to be included in the order. The order was thereupon modified and an order was entered restraining defendants from mass picketing, from parking their automobiles in any space within 300 yards of plaintiff's plant, from interfering with his delivery trucks and drivers, from threatening to injure or injuring any of plaintiff's employees, from coercing or attempting to coerce, intimidate or threaten them, and from generally interfering with or obstructing plaintiff and his employees in the conduct of plaintiff's business, either at the plant or while any of them were upon the public highways in pursuit of their respective duties.

Defendants' counsel assert that the court at no time read the complaint, that nobody read it in the court's presence or made a

or having anyone read it to him or point out the material allegations thereof, announced "I am now choosing to hear some evidence." Counsel for defendants thereupon again called the court's attention to the fact that he had requested additional time, but the court said, "Well, I'll see if I will give it to you." and thereupon proceeded to hear the testimony of plaintiff, who related the alleged conduct of defendants' agents on two separate occasions, which purported to show certain unlawful acts, intimidations and interference with plaintiff's business. After plaintiff had testified and had been cross-examined, defendants' counsel asked for leave to rebut the evidence adduced before the court, but the chancellor said that he was too busy with other court matters, that it was merely a preliminary hearing in support of the motion for a temporary restraining order, and that defendants might the next day or at any subsequent time move for a dissolution of the injunction. At the conclusion of the hearing the court indicated that he would issue a temporary injunction and the order was then presented to him. It enumerated fifteen separate items or acts, from which defendants were sought to be restrained. After considering the order briefly the court announced that he would restrain defendants from doing only six of the acts specified, and suggested that counsel proceed to the jury room for a conference and advert the six items to be included in the order. The order was thereupon modified and an order was entered restraining defendants from mass picketing, from parking their automobiles in any space within 300 yards of plaintiff's plant, from interfering with the ingress and egress of plaintiff's employees, from intimidating or injuring any of plaintiff's employees, from threatening to injure or injuring delivery trucks and drivers, from obstructing or attempting to obstruct plaintiff and his employees in the conduct of plaintiff's business, either at the plant or while any of them were upon the public highways in pursuit of their respective duties.

Defendants' counsel argued that the court of on line was the complaint, that nobody read it to the court's presence or made a

comprehensive statement showing the contents thereof, and on oral argument plaintiff's counsel conceded this to be a fact. It is therefore apparent that since the court was not familiar with the contents of the bill the injunction could not have been issued upon the face of the verified complaint. That leaves only one alternative, namely, that the court considered evidence adduced by plaintiff as sufficient justification for issuing the restraining order. Since defendants had indicated to the court orally, and by way of objection to the issuance of the temporary order, a denial of the alleged acts of violence, intimidation, coercion and interference with plaintiff's business, the court should at least have allowed them to introduce evidence in rebuttal of plaintiff's testimony.

As the record stands the restraining order was evidently entered on an ex parte hearing of plaintiff's testimony, and without giving defendants an opportunity of denying the charges made. This we think was erroneous. It requires no citation of authorities to support the proposition that the issuance of an injunction is an extraordinary remedy, and defendants, who appeared in court by their counsel for the purpose of interposing an objection to the issuance of the order, were entitled to at least as much consideration as plaintiff, who invoked the jurisdiction of the court for this extraordinary purpose.

The only defendants who prosecute this appeal are the Dairy Employees Union, Local 754 et al., and International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local 301 et al. As to them, we are satisfied after a careful consideration of the record, that the injunction was improvidently entered and should be reversed. It is so ordered.

INJUNCTION REVERSED AS TO
APPEALING DEFENDANTS.

Sullivan, P. J., and Scanlan, J., concur.

comprehensive statement showing the contents thereof, and on oral argument plaintiff's counsel conceded this to be a fact. It is therefore apparent that since the court was not familiar with the contents of the bill the injunction could not have been issued upon the face of the verified complaint. That leaves only one alternative, namely, that the court considered evidence adduced by plaintiff as sufficient justification for issuing the restraining order. Since defendants had indicated to the court orally, and by way of objection to the issuance of the temporary order, a denial of the alleged acts of violence, intimidation, coercion and interference with plaintiff's business, the court should at least have allowed them to introduce evidence in rebuttal of plaintiff's testimony.

As the record stands the restraining order was evidently entered on an ex parte hearing of plaintiff's testimony, and without giving defendants an opportunity of denying the charges made. This we think was erroneous. It requires no citation of authorities to support the proposition that the issuance of an injunction is an extraordinary remedy, and defendants, who appeared in court by their counsel for the purpose of interposing an objection to the issuance of the order, were entitled to at least an equal opportunity with plaintiff, who invoked the jurisdiction of the court for this extraordinary purpose.

The only defendants who prosecute this appeal are the Dairy Employees Union, Local 727, et al., and International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local 501 et al. As to them, we are satisfied after a careful consideration of the record, that the injunction was improvidently entered and should be reversed. It is so ordered.

INJUNCTION DISSOLVED IN THE APPELLATE DIVISION.

Gallivan, P. J., and Beaslan, J., concur.

304 Ill. App.

40272

CLARA WARNEKE, Administratrix of the Estate of Frank Warneke, Deceased,
Appellee,

v.

HENRY A. TORSTENSON,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

304 I.A. 579

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover damages for the wrongful death of her husband. The action was brought for the benefit of herself, as widow of the deceased, and for his minor children. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages in the sum of $3,500. Defendant appeals from a judgment entered upon the verdict.

The amended complaint charges, in substance, that on June 28, 1934, defendant was driving an automobile in a northwesterly direction over and along Higgins road and Cumberland avenue, both public highways in the town of Norwood Park, in Cook county, Illinois; that Higgins road runs northwest and southeast, and Cumberland avenue runs north and south; that the said highways intersect one another at an acute angle; that plaintiff's intestate was driving another automobile on Higgins road, a short distance northwest of Cumberland avenue, and was then and there in the exercise of due care and caution for his own safety; that defendant caused or permitted his automobile to strike the automobile which plaintiff's intestate was driving so that plaintiff's intestate was injured, as a result of which he died, on July 7, 1934; that defendant, at the time in question, negligently and carelessly drove and operated his automobile; that he negligently and carelessly drove his automobile at a speed greater than proper, having regard to the traffic and use of the way; that he negligently and carelessly

CLARA WARNOCK, Administratrix
of the Estate of Frank Warnock
Deceased,

Appellee,

v.

HENRY A. TONNEMACHER,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover damages for the wrongful death of her husband. The action was brought for the benefit of herself, as widow of the deceased, and for his minor children. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages in the sum of $1,500. Defendant appeals from a judgment entered upon the verdict.

The amended complaint charges, in substance, that on June 20, 1924, defendant was driving an automobile in a northwesterly direction over and along Higgins road and Cumberland avenue, both public highways in the town of Norwood Park, in Cook county, Illinois; that Higgins road runs northeast and southwest, and Cumberland avenue runs north and south; that the said highways intersect one another at an acute angle; that plaintiff's intestate was driving another automobile on Higgins road, a short distance northwest of Cumberland avenue, and was then and there in the exercise of due care and caution for his own safety; that defendant caused or permitted his automobile to strike the automobile which plaintiff's intestate was driving so that plaintiff's intestate was injured, as a result of which he died, on July 7, 1924; that defendant, at the time in question, negligently and carelessly drove and operated his automobile; that he negligently and carelessly drove his automobile at a speed greater than proper, having regard to the traffic and use of the way; that he negligently and carelessly

drove his automobile at a dangerous rate of speed; that defendant negligently and carelessly failed to keep a proper lookout, so that he failed to see plaintiff's intestate, who was lawfully on the highway. The complaint alleges that the deceased left him surviving his widow and three children, all minors, to whose support he had contributed, "wherefore, plaintiff asks judgment against the defendant for Ten Thousand Dollars." The answer of defendant states, in substance, that he was not guilty of the acts charged in plaintiff's complaint, nor was the alleged accident and resulting death caused through any negligence on his part, but that, on the contrary, the alleged accident, injury and resulting death were caused through the sole fault and negligence of plaintiff's intestate.

This was the second trial of the cause. On the first trial, the trial court, at the conclusion of plaintiff's evidence, directed a verdict for defendant. Plaintiff appealed. We held, Warneke v. Torstenson, 289 Ill. App. 621 (abstract opinion), that "plaintiff made out a clear, prima facie case against defendant and that the trial court committed a serious error in directing a verdict for defendant," and we reversed the judgment and remanded the cause for a new trial.

Upon the instant appeal defendant contends that "the trial court erred in refusing to direct a verdict in favor of the defendant." The only living witness to the accident was defendant, and in the first trial plaintiff called him as an adverse witness under section 60 of the Civil Practice Act. Upon the second trial defendant was "called as a witness by the plaintiff" and defendant's counsel was, therefore, allowed to cross-examine defendant, and it is contended that plaintiff failed to make out a prima facie case for the reason that upon the cross-examination it was shown for the first time that the deceased failed to obey the Motor Vehicles Act of this State in failing to hold out his hand or give any other suitable warning to defendant, who was following behind decedent's car,

drove his automobile at a dangerous rate of speed; that defendant negligently and carelessly failed to keep a proper lookout, so that he failed to see plaintiff's intestate, who was lawfully on the highway. The complaint alleges that the deceased left him surviving his widow and three children, all minors, to whom support he had contributed, "wherefore, plaintiff asks judgment against the defendant for Ten Thousand Dollars." The answer of defendant states, in substance, that he was not guilty of the acts charged in plaintiff's complaint, nor was the alleged accident and resulting death caused through any negligence on his part, but that, on the contrary, the alleged accident, injury and resulting death were caused through the sole fault and negligence of plaintiff's intestate.

This was the second trial of the cause. On the first trial, the trial court, at the conclusion of plaintiff's evidence, directed a verdict for defendant. Plaintiff appealed. We held, Lawson v. Lardgarden, 209 Ill. App. 641 (abstract opinion), that plaintiff made out a clear, prima facie case against defendant and that the trial court committed a serious error in directing a verdict for defendant," and we reversed the judgment and remanded the cause for a new trial.

Upon the instant appeal defendant contends that "the trial court erred in refusing to direct a verdict in favor of the defendant." The only living witness to the accident was defendant, and in the first trial plaintiff called him as an adverse witness under section 60 of the Civil Practice Act. Upon the second trial defendant was "called as a witness by the plaintiff" and defendant's counsel was, therefore, allowed to cross-examine defendant, and it is contended that plaintiff failed to make out a prima facie case for the reason that upon the cross-examination it was shown for the first time that the deceased failed to obey the Motor Vehicles Act of this State in failing to hold out his hand or give any other suitable warning to defendant, who was following behind deceased's car,

which would indicate to defendant the intention of the deceased to put on the brakes of his car and slow down its speed to fifteen miles an hour; that the said facts so developed upon cross-examination shed additional light upon the entire subject matter of the accident and showed that the collision was due solely to the negligent conduct of the deceased; that this court has before it, upon this appeal, a record wherein the proof is substantially different from the record in the first trial, and that our ruling upon the former appeal, as to the effect of the evidence, is not binding upon the present appeal. Defendant concedes that if the evidence in both trials was substantially the same his contention would not be well taken. Plaintiff strenuously argues that even with the additional evidence adduced upon the cross-examination the jury would have been fully warranted in finding that the deceased was not guilty of contributory negligence that proximately contributed to the injury and that plaintiff made out a clear, prima facie case.

The law applicable to defendant's motion to direct a verdict in his favor is well settled. "'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296-7.)" (Mahan v. Richardson, 284 Ill. App. 493, 495.) "The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party

which would indicate to defendant the intention of the deceased to put on the brakes of his car and slow down his speed to fifteen miles an hour; that the said facts so developed upon cross-examination shed additional light upon the entire subject matter of the accident and showed that the collision was due solely to the negligent conduct of the deceased; that this court has before it, upon this appeal, a record wherein the proof is substantially different from the record in the first trial, and that our ruling upon the former appeal, as to the effect of the evidence, is not binding upon the present appeal. Defendant concedes that if the evidence in both trials was substantially the same his contention would not be well taken. Plaintiff strenuously argues that even with the additional evidence adduced upon the cross-examination the jury would have been fully warranted in finding that the deceased was not guilty of contributory negligence that proximately contributed to the injury and that plaintiff made out a clear, prima facie case.

The law applicable to defendant's motion to direct a verdict in his favor is well settled. "A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Pass v. Pass, 233 Ill. 414; McCune v. Reynolds, 288 id. 188; Miami v. Bush, 273 id. 458." (Dunlap v. Irons, 321 Ill. 321, 324-5.) (Wahlen v. Riedmeyer, 324 Ill. 109, 113, 117.) "The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party

has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburgh Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.) See, also, the late opinion of the Supreme court in Ziraldo v. Lynch Co., 365 Ill. 197, wherein it is stated (pp. 199, 200): "Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 id. 614.) We cannot weigh the evidence to determine, as a matter of fact, whether the plaintiff was guilty of contributory negligence, (Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104,) and we cannot reject testimony as improbable unless it is contrary to some natural law. Zetsche v. Chicago, Peoria and St. Louis Railway Co., 238 Ill. 240."

has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Wabash, St. Louis and Pittsburgh Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petro v. Illinois, 297 Ill. 476, 240. See, also, Pallant v. Peoples Gas Light and Coke Co., 359 Ill. 112, 122, 121.) See, also, the late opinion of the Supreme court in Kirlin v. Lynch Co., 369 Ill. 197, wherein it is stated (pp. 197, 200): "Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Bachmann, 197 Ill. 470; Kuelle v. Fabian, 252 id. 630; O'Donnie v. Brown, 241 id. 376.) A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Kenney v. Illinois Steel Co., 242 Ill. 37; City of Odgen v. Jarvis, 226 id. 614.) We cannot weigh the evidence in determining, as a matter of fact, whether the plaintiff was guilty of contributory negligence. (Dawson v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 317 Ill. 124.) and we cannot reject testimony as improbable unless it is contrary to some natural law. Eastman v. Chicago, Peoria and St. Louis Railway Co., 230 Ill. 444."

The following is the substance of defendant's testimony upon the second trial: He lived in Evanston and was a painting and decorating contractor in Chicago; that he knew the deceased intimately and saw him pretty nearly every day; that the deceased was in the insurance business and also did a little collecting for defendant and others; that on the evening of the accident the deceased and defendant were engaged in making collections for the latter; that about midnight they finished their business and started homeward; that deceased was going to his summer home at Gage's Lake, and witness to his home in Evanston; that witness and deceased drove separate cars and each was alone in his car; "Q. What route did you take as you started home or as you went home? A. Well, we connected up to Higgins Road, but from what street we got into it I don't know, but it was in Oak Park somewhere. We got ahold of Higgins Road. He was leading the way because he knew the roads there and he traveled back and forth a lot, and, of course, I followed him. * * * Q. Having gotten on Higgins Road, where did you expect to go, from Higgins Road? A. We expected to cut into Cumberland Avenue. Q. And you say you did not know very well where Cumberland Road was? A. I did not know where the intersection was. * * * Q. So that when you reached Cumberland you both intended to turn off there? A. To turn right. Q. * * * both your route and his route were still together that far? A. Oh, yes, sir. Q. As you came up to Cumberland Road there, about how fast were you both going? A. I would say between 35 and 40 miles." The witness further testified that before the accident happened there were no other cars on the road going in either direction "within easy sight," and there were no cars parked anywhere on the road; that the pavement of Higgins road was very good; that it was a perfectly clear night and the visibility was good; that it was easy for the witness to see; that as they approached Cumberland avenue witness was from fifty to a hundred feet behind the car of the deceased; that Higgins road is a State highway, a four-lane road; that the deceased and defendant drove in the right lane going north; "Q. And where did that

The following is the substance of defendant's testimony upon the second trial: He lived in Evanston and was a painting and decorating contractor in Chicago; that he knew the deceased intimately and saw him pretty nearly every day; that the deceased was in the insurance business and also did a little collecting for defendant and others; that on the evening of the accident the deceased and defendant were engaged in making collections for the latter; that about midnight they finished their business and started homeward; that deceased was going to his summer home at Gage's Lake, and witness to his home in Evanston; that witness and deceased drove separate cars and each was alone in his car; "Q. What route did you take as you started home or as you went home? A. Well, we commenced up to Higgins Road, but from what street we got into it I don't know, but it was in Oak Park somewhere. We got ahold of Higgins Road. He was leading the way because he knew the roads there and he traveled back and forth a lot, and, of course, I followed him. * * * Q. Having gotten on Higgins Road, where did you expect to go, from Higgins Road? A. We expected to cut into Cumberland Avenue. Q. And you say you did not know very well where Cumberland Road was? A. I did not know where the intersection was. * * * Q. So that when you reached Cumberland you both intended to turn off there? A. To turn right. Q. * * * both your route and his route were still together that far? A. Oh, yes, sir. Q. As you came up to Cumberland Road there, about how fast were you both going? A. I would say between 35 and 40 miles." The witness further testified that before the accident happened there were no other cars on the road going in either direction "within many miles", and there were no cars parked anywhere on the road; that the pavement of Higgins road was very good; that it was a perfectly clear night and the visibility was good; that it was easy for the witness to see; that as they approached Cumberland avenue witness was from fifty to a hundred feet behind the car of the deceased; that Higgins road is a State highway, a four-lane road; that the deceased and defendant drove in the right lane going north; "Q. And where did the

collision occur with reference to Cumberland? A. North of Cumberland. Q. Could you say how far north of Cumberland? * * * A. Probably two hundred feet, maybe a hundred and fifty feet. I am not sure;" that defendant's car struck the rear of decedent's car about a hundred feet north of the intersection at Cumberland; that decedent's car traveled from fifty to seventy-five feet after the impact before it came to a stop in a ditch on the right hand side of the road; that it was then leaning against a telephone pole in the ditch; "Q. Now, then, at the time that you were crossing Cumberland, let us say, at the time that you were behind him, as you say, from fifty to a hundred feet and he was just reaching Cumberland, will you tell the Court and jury in your own way, as best you can, what his car did, as you saw it, and what you did, up to the time of and including the collision? A. My version of it is that he realized that he had passed Cumberland and as he went past, I thought to myself, 'I believe it is Cumberland,' but I didn't know the roads and I turned my head to see if I could notice Cumberland, and as I turned my head back his car was slowed up to almost a stop, but he was still moving. By the time I could slam on my brakes I hit the rear end of his car squarely. In other words, not on either side, but directly in back, because we were following. Q. When you say his car slowed, did you see it long enough to estimate the speed of his car at the time there that you say it just slowed? A. Well, I think we were going around fifteen miles an hour when we struck. A. About fifteen? A. Yes. Q. How fast had you been going as you approached Cumberland? A. Around thirty-five or forty. * * * Q. As you went across Cumberland and while you were looking to the right to see if it was Cumberland and until you turned around again, you were still going thirty-five or forty miles an hour? A. Yes, sir, until I saw him slow up and then I slammed on the brakes. Q. Up until the instant when you noticed he had slowed you were still going thirty-five or forty? A. Yes. Q. How far were you behind him when you realized that he had slowed? A. About thirty-five, fifty feet. Q. * * * and that is the time you put on your brakes? A.

collision much with reference to Sumberland? A. Much of Sumberland.

Q. Could you say how far north of Sumberland * * * A. Probably two hundred feet, maybe a hundred and fifty feet. I am not sure." That defendant's car struck the rear of Sundent's car about a hundred feet north of the intersection of Sumberland that defendant's car travelled from fifty to seventy-five feet after the impact before it came to a stop in a ditch on the right hand side of the road; that it was then leaning against a telephone pole in the ditch". Now, then, at the time that you were crossing Sumberland, let us say, at the time that you were behind him, as you say, from fifty to a hundred feet and he was just reaching Sumberland, will you tell the Court and jury in your own way, as best you can, what his car did, as you saw it, and what you did, up to the time of and including the collision? A. My version of it is that he realized that he had passed Sumberland and as he went past, I thought to myself, 'I believe it is Sumberland', but I didn't know the roads and I turned my head to see if I could notice Sumberland, and as I turned my head back his car was slowed up to almost a stop, but he was still moving. By the time I could slam on my brakes I hit the rear end of his car squarely. In other words, not on either side, but directly in back, because we were following.

Q. When you say his car slowed, did you see it long enough to estimate the speed of his car at the time there that you say it just slowed? A. Well, I think we were going around fifteen miles an hour when we struck. A. About fifteen? A. Yes. Q. Now that had been going as you approached Sumberland? A. Around thirty-five or forty. * * *

Q. As you went across Sumberland and while you were looking to the right he was if it was Sumberland and until you turned around again, you were still going thirty-five or forty miles an hour? A. Yes, sir, until I saw him slow up and then I slammed on the brakes. Q. Up until the instant when you noticed he had slowed you were still going thirty-five or forty? A. Yes. Q. How far were you behind him when you realized that he had slowed? A. About thirty-five, fifty feet. Q. * * * and that is the time you put on your brakes? A.

Yes, sir. Q. And that is the time when you say he was going about fifteen miles an hour and you were going about thirty-five or forty? A. Yes. Q. Now, could you tell how much farther he went after you made that observation before you finally hit him? A. No, I couldn't. * * * Q. Of course, it happened pretty fast. A. Sure, I didn't have a chance to see. All I thought of was to slam on the brakes. Q. You didn't turn one side or the other? A. No, sir. Q. And he didn't turn to one side or the other until after you hit him? A. Yes, that is correct. Q. You were both going parallel to the edge of the highway? A. That is right. Q. And you continued to go parallel with the edge of the highway until after you hit? A. Yes, sir. Q. When you say you looked towards Cumberland, you turned your head, but you didn't say in which direction. In which direction was it you looked? A. To the right. Q. That would be sort of towards the east or northeast, is that it? A. Correct. Q. Now, when you looked at Cumberland to see if it was Cumberland, or when you turned your head that way, had you reached Cumberland? A. Yes, sir. Q. Well, had you gotten— A. That is what prompted me to look, because I thought we had passed it and I wanted to check it. Q. You thought he had passed it? A. Yes. Q. Had you passed it when you turned? A. I was right in the intersection. Q. You were right in the middle, were you, somewhere? A. Yes, sir. Q. So that your looking towards Cumberland was from that point until the point, as you said before, that you turned around and saw that he was slowed, is that correct? * * * You just took one look? A. Yes, sir. Q. You didn't look two or three times? A. No, sir. Q. You looked, and during that time your car went from somewhere in the middle of the intersection to the point where you made the other observation and saw he was slowing up? A. Yes. Q. Which would be another fifty or seventy-five feet beyond — Mr. Crowe [attorney for defendant]: Wait a minute. He hasn't said while he looked he went any seventy-five feet. Mr. McKenna [attorney for plaintiff]: I am asking him. Mr.

Yes, sir. Q. And that is the time when you say he was going about fifteen miles an hour and you were going about thirty-five or forty? A. Yes. Q. Now, could you tell how much further he went after you made that observation before you finally hit him? A. No, I couldn't. * * * Q. Of course, it happened pretty fast. A. Sure, I didn't have a chance to see. All I thought of was to slam on the brakes. Q. You didn't turn one side or the other? A. No, sir. Q. And he didn't turn to one side or the other until after you hit him? A. Yes, that is correct. Q. You were both going parallel to the edge of the highway? A. That is right. Q. And you continued to go parallel with the edge of the highway until after you hit? A. Yes, sir. Q. When you say you looked towards Cumberland, you turned your head, but you didn't say in which direction. In which direction was it you looked? A. To the right. Q. That would be sort of towards the east or northeast, is that it? A. Correct. Q. Now, when you looked at Cumberland to see if it was Cumberland, or when you turned your head that way, had you reached Cumberland? A. Yes, sir. Q. Well, had you gotten— A. That is what prompted me to look, because I thought we had passed it and I wanted to check it. Q. You thought he had passed it? A. Yes. Q. Had you passed it when you turned? A. I was right in the intersection. Q. You were right in the middle, were you, somewhere? A. Yes, sir. Q. So that your looking towards Cumberland was from that point until the point, as you said before, that you turned around and saw that he was slowed, is that correct? * * * You just took one look? A. Yes, sir. Q. You didn't look two or three times? A. No, sir. Q. You looked, and during that time your car went from somewhere in the middle of the intersection to the point where you made the other observation and saw he was slowing up? A. Yes. Q. Which would be another fifty or seventy-five feet beyond — Mr. Crowe [attorney for defendant]: Wait a minute. He hasn't said while he looked he went any seventy-five feet. Mr. Lerman [attorney for plaintiff]: I am asking him. Mr.

Crowe: No. Ask him. You haven't asked him how long he looked or how long it took to make this look. Mr. McKenna: I will, if you don't mind. Mr. Crowe: All right. Mr. McKenna: Q. The point I am adverting now to is, as I recall your testimony, you said at the time you made the observation that you looked around again and saw he was slowing up and that you were then about seventy-five feet beyond the corner of Cumberland. That is correct, isn't it? A. Approximately, I would say. Q. So that your look that you took at Cumberland started when you were in the middle of the intersection there and that look ended anywhere about seventy-five feet or so past the intersection, is that correct? A. It ended when I was about fifty feet from him. Q. Yes, but as I understand you, at that time you were about fifty feet or seventy-five beyond the intersection, or am I wrong on that? A. It is about right, I guess, approximately right. Q. You looked how far? The length it took was from the middle of the intersection to some fifty feet or so beyond the intersection? A. Yes. Q. Could you estimate in seconds how long you looked away? A. I guess it would be a fraction of a second, turning my head and back again. Q. You say 'guess.' I suppose that is the best you can do. It is just a guess? You can't estimate it really? A. That is all. Mr. Crowe: Let the record show the witness indicates by moving his head to the right and immediately right back to a forward position. * * * Q. Now, was your car in ordinarily good condition? A. Yes, sir. Q. The brakes were working all right? A. Yes, sir. Q. And so on? A. I had my car in regular service. Q. Now, with your car in the condition it was that night, and going at from thirty-five to forty miles an hour, in about what distance could you stop? A. Oh, probably seventy-five feet. Q. About seventy-five feet? A. Fifty, seventy-five feet, I don't know. Q. Fifty or seventy-five feet. That is your best estimate, is it? A. Yes. Q. Incidentally, do you remember testifying before in another hearing of this case? A. Yes, sir. * * * Q. Do you remember at that time I asked this question: * * * 'Question:

Crowe: No, Ask him. You haven't asked him how long he looked or how long it took to make this look. Mr. McKenna: I will, if you don't mind. Mr. Crowe: All right. Mr. McKenna: Q. The point I am advertising now to is, as I recall your testimony, you said at the time you made the observation that you looked around again and saw he was driving up and that you were then about seventy-five feet beyond the corner of Cumberland. That is correct, isn't it? A. Approximately, I would say. Q. So that your look that you took at Cumberland started when you were in the middle of the intersection there and that look ended anywhere about seventy-five feet or so past the intersection, is that correct? A. It ended when I was about fifty feet from him. Q. Yes, but as I understand you, at that time you were about fifty feet or seventy-five beyond the intersection, or am I wrong on that? A. It is about right, I guess, approximately right. Q. You looked how far? The length it took was from the middle of the intersection to some fifty feet or so beyond the intersection? A. Yes. Q. Could you estimate in seconds how long you looked away? A. I guess it would be a fraction of a second, turning my head and back again. Q. You say 'guess.' I suppose that is the best you can do. It is just a guess? You can't estimate it really? A. That is all. Mr. Crowe: Let the record show the witness indicates by moving his head to the right and immediately right back to a forward position. * * * Q. Now, was your car in ordinarily good condition? A. Yes, sir. Q. The brakes were working all right? A. Yes, sir. Q. And so on? A. I had my car in regular service. Q. Now, with your car in the condition it was that night, and going at from thirty-five to forty miles an hour, in about what distance could you stop? A. Oh, probably seventy-five feet. Q. About seventy-five feet? A. Fifty, seventy-five feet, I don't know. Q. Fifty or seventy-five feet. That is your best estimate, is it? A. Yes. Q. Incidentally, do you remember testifying before in another hearing of this case? A. Yes, sir. * * * Q. Do you remember at that time I asked this question: * * * 'Question:

What I am asking you is this: At the time that you were twenty-five feet or so behind him, you were seventy-five to a hundred feet from the intersection, the northwest corner of the intersection? Answer: Yes.' A. Yes. Q. You did make that answer, did you? A. Yes. Q. So that probably was correct. A. Yes. Q. And your recollection at that time was no doubt as good or better than it is now? A. Yes, sir. Q. Now, then, when you struck him, after you struck him, how far did you keep on going? A. I stopped right there. * * * Q. Say, in fifteen or twenty feet? A. Yes, sir. Q. His car, of course, had not come to a stop before you hit him? It was still in motion? A. He rode along for a few more feet after that. Q. Just before you hit him, at the time, he was still going? A. He was still going, yes. Q. About fifteen miles an hour, I think you said? A. I think so. Q. And then when you hit him about how much faster than he were you going? A. I estimate about five miles. * * * Q. So that you would be going at the time you hit him about twenty miles an hour? A. I would say so. Q. You had reduced, in the interval from the time you saw him, from about thirty-five or forty to about twenty? A. Yes. Q. Do you remember at the last trial I asked you a question? We were talking about stopping distances. This is the question: 'Question: I don't mean the time. I mean the distance. How far would you have to go before you could stop on that kind of a road bed with your brakes in that condition with that car, or do you know? Answer: I would say probably twenty to twenty-five feet.' Do you remember that I asked you that? A. Yes. Q. And you made that estimate? A. Yes. * * * Q. I mean if you had been looking away and you looked around and suddenly found that there was an emergency, you think then it would take you, with your car in that condition on the road bed as it was that night, from fifty to seventy-five feet to stop? A. No, I could stop quicker, under an emergency and pressure." Then followed the cross-examination by defendant's counsel, upon which examination defendant bases his claim that the testimony in the instant trial was so materially different from the evidence in the first trial that plaintiff failed to make out

What I am asking you is this: At the time that you were twenty-five feet or so behind him, you were seventy-five or a hundred feet from the intersection, the northwest corner of the intersection? Answer: Yes.' A. Yes. Q. You did make that answer, did you? A. Yes. Q. So that probably was correct. A. Yes. Q. And your recollection at that time was no doubt as good or better than it is now? A. Yes, sir. Q. Now, then, when you stopped his, after you started his, how far did you keep on going? A. I stopped right there. * * * Q. Say, in fifteen or twenty feet? A. Yes, sir. Q. His car, of course, had not come to a stop before you hit him? It was still in motion? A. He rode along for a few more feet after that. Q. That before you hit him, at the time, he was still going? A. He was still going, yes. Q. About fifteen miles an hour, I think you said? A. I think so. Q. And then when you hit him about how much faster than he were you going? A. I estimate about five miles. * * * Q. So that you would be going at the time you hit him about twenty miles an hour? A. I would say so. Q. You had reached, in the interval from the time you saw him, from about thirty-five or forty to about twenty? A. Yes. Q. Do you remember at the last trial I asked you a question? We were talking about stopping distances. This is the question: 'Question: I don't mean the time. I mean the distance. How far would you have to go before you could stop on that kind of a road bed with your brakes in that condition with that car, or do you know? Answer: I would say probably twenty to twenty-five feet.' Do you remember that I asked you that? A. Yes. Q. And you made that estimate? A. Yes. * * * Q. I mean if you had been looking away and you looked around and suddenly found that there was an emergency, you think then it would take you with your car in that condition on the road bed as it was that night, from fifty to seventy-five feet to stop? A. No, I could stop quicker under an emergency and pressure." Then followed the cross-examination by defendant's counsel, upon which examination defendant based his claim that the testimony in the instant trial was so materially different from the evidence in the first trial that plaintiff failed to make out

a prima facie case: "Cross Examination by Mr. Crowe: Q. Mr. Torstenson, I would like to ask you if before, just as you were coming along to this Cumberland Road, and as you passed it, were the lights lighted on the front of your automobile? A. Yes, sir. Q. And did they shine distinctly on the Warneke car ahead of you? A. Yes, sir. Q. Did Mr. Warneke hold out his hand or give any warning of any intention to you that he was going to come to a sudden stop? A. No, sir. Q. At the time your car bumped into the rear of his, about what would you say the speed of his car had come down to? A. I would say about fifteen miles per hour. Q. And, as I recall, you said your car at that time, when you were slowing down there, you got down to about twenty? A. That is right. Q. What damage was done to your car, if any? A. The fender and the radiator shell was bent in. Q. Badly? A. No. Q. Was there any damage done to the back end of Mr. Warneke's car? A. No, sir, the two bumpers came together and his bumper stuck out far enough — Q. Were you injured or jolted at all? A. No, sir. Q. After this collision his car went on; what course did it take? A. It went straight ahead and all of a sudden swerved to the right. It didn't go sideways in the ditch, but went straight into the ditch. Q. How far did it go straight before it turned? A. Probably twenty feet, twenty-five feet. Q. Was there any horn blown or any other signal given to you by Mr. Warneke in the car ahead? A. No, sir. Mr. Crowe: That is all. Step down. Mr. McKenna: Just a moment, please. Redirect Examination By Mr. McKenna: Q. During the time that you were looking away, of course, you don't know whether Mr. Warneke held out his hand or not, do you? A. I base my opinion on that he couldn't put his hand out and bring it back as fast as I could turn my head. I didn't see any signal from him. Q. He hadn't begun to slow until he was beyond Cumberland. As you both came up to Cumberland neither of you slowed until after you passed Cumberland? A. Apparently not, because I would have seen it before I turned my head. Mr. McKenna: That is all." Upon recross-examination the witness testified that decedent's car had one red stop light in the rear of

Cross Examination by Mr. Crowe: Q. Mr. Torstenson, I would like to ask you if before, just as you were coming along to this Cumberland Road, and as you passed it, were the lights lighted on the front of your automobile? A. Yes, sir. Q. And did they shine distinctly on the Wernecke car ahead of you? A. Yes, sir. Q. Did Mr. Wernecke hold out his hand or give any warning of any intention to you that he was going to come to a sudden stop? A. No, sir. Q. At the time your car bumped into the rear of his, about what would you say the speed of his car had come down to? A. I would say about fifteen miles per hour. Q. And, as I recall, you said your car at that time, when you were slowing down there, you got down to about twenty? A. That is right. Q. What damage was done to your car, if any? A. The fender and the radiator shell was bent in. Q. Badly? A. No. Q. Was there any damage done to the back end of Mr. Wernecke's car? A. No, sir, the two bumpers came together and his bumper stuck out far enough — Q. Were you injured or jolted at all? A. No, sir. Q. After this collision his car went on; what course did it take? A. It went straight ahead and all of a sudden swerved to the right. It didn't go sideways in the ditch, but went straight into the ditch. Q. How far did it go straight before it turned? A. Probably twenty feet, twenty-five feet. Q. Was there any horn blown or any other signal given to you by Mr. Wernecke in the car ahead? A. No, sir. Mr. Crowe: That is all. Step down. Mr. McKenna: Just a moment, please. Redirect Examination by Mr. McKenna: Q. During the time that you were leaving away, of course, you don't know whether Mr. Wernecke held out his hand or not, do you? A. I base my opinion on that he couldn't put his hand out and bring it back as fast as I could turn my head. I didn't see any signal from him. Q. He hadn't begun to slow until he was beyond Cumberland. As you both come up to Cumberland neither of you stopped until after you passed Cumberland? A. Apparently not, because I would have seen it before I turned my head. Mr. McKenna: That is all." Upon remote-examination the witness testified that decedent's car had one red stop light in the rear of

the car on the left hand side; "I know it was burning. His light was burning. Q. Was it burning all the same all the way along before the accident? A. I don't know. * * * I believe it was a constant light, but I am not sure."

Defendant cites section 33 (5) of the Illinois Motor Vehicles Act (Cahill's Ill. Rev. Stat. 1933, ch. 95a, par. 34), which provides that "No driver of a vehicle shall suddenly stop or slow down without first signaling his intention with outstretched arm or otherwise to those following closely in the rear nor shall he turn without signaling in a similar manner both to those following closely and those approaching from the opposite direction," and contends that the deceased was guilty of negligence in failing to obey the aforesaid provision of the statute and that the proximate cause of the accident was his failure in that regard.

Even if there was a violation of the statute by decedent, such violation would not bar a right to recover unless the unlawful act in some way proximately contributed to the accident, and it would be a question of fact for the jury to determine from all the facts and circumstances whether the violation was the proximate cause of the injury. See Lerette v. Director General, 306 Ill. 348. In that case it is stated (pp. 353, 354): "It is only where the facts are admitted and all reasonable minds agree that the injury was the result of plaintiff's own negligence that this court may, as a matter of law, find that there was such contributory negligence on the part of plaintiff as to defeat a recovery." See, also, Burke v. Zwick, 299 Ill. App. 558, 563. Section 33 (5) provides that the signal should be "with outstretched arm or otherwise to those following closely in the rear." In the instant case defendant testified that decedent's car had one red stop light in the rear of the car on the left hand side and that it was burning just before the accident. He further testified that he did not know whether the light was burning all the way along before the accident, and while he attempted to qualify this statement the jury would have had a right to infer from

the car on the left hand side; "I know it was burning. The light was burning. Q. Was it burning all the same all the way along before the accident? A. I don't know, * * * I believe it was a constant light, but I am not sure."

Defendant cites section 33 (5) of the Illinois Motor Vehicles Act (Smith's Ill. Ann. Stat., 1913, ch. 95½, par. 34), which provides that "No driver of a vehicle shall suddenly stop or slow down without first signaling his intention with outstretched arm or otherwise to those following closely in the rear nor shall he turn without signaling in a similar manner both to those following closely and those approaching from the opposite direction," and contends that the deceased was guilty of negligence in failing to obey the aforesaid provision of the statute and that the proximate cause of the accident was his failure in that regard.

Even if there was a violation of the statute by deceased, such violation would not bar a right to recover unless the unlawful act in some way proximately contributed to the accident, and it would be a question of fact for the jury to determine from all the facts and circumstances whether the violation was the proximate cause of the injury. See Lorette v. Director General, 306 Ill. 348. In that case it is stated (pp. 353, 354): "It is only where the facts are admitted and all reasonable minds agree that the injury was the result of plaintiff's own negligence that this court may, as a matter of law, find that there was such contributory negligence on the part of plaintiff as to defeat a recovery." See, also, Burke v. Dolde, 299 Ill. App. 578, 583. Section 33 (5) provides that the signal should be "with outstretched arm or otherwise to those following closely in the rear." In the instant case defendant testified that decedent's car had one red stop light in the rear of the car on the left hand side and that it was burning just before the accident. He further testified that he did not know whether the light was burning all the way along before the accident, and while he attempted to qualify this statement the jury would have had a right to infer from

his entire evidence on the subject of the red stop light that it was on just before the accident but not before. We cannot agree with defendant's contention that for the purposes of the motion to direct a verdict the only reasonable inference that could be drawn from defendant's evidence was that the deceased did not signal his intention to slow down "with outstretched arm." The witness was vitally interested in the result of the trial, and the jury had the right to closely scrutinize his entire testimony in order to determine the facts surrounding the accident. Because decedent knew the neighborhood in question and defendant did not, it was arranged that defendant should follow decedent, which situation required that defendant should pay close attention to the movements of decedent's car. It was past midnight, there were no other cars upon the road at the time, and decedent had every right to assume that defendant would pay close attention to the movements of the car of the former. Defendant testified that he did not know where Cumberland road was and that it was because of that fact that decedent took the lead; that when he, defendant, turned his head "to see if it was Cumberland" he was in the middle of the intersection of Higgins road and Cumberland avenue. As he did not know the street the only reasonable inference to be drawn from his evidence is that he turned his head in an effort to see a street sign. While he testified that turning his head to the right and back again took a "fraction of a second," he further stated that his estimate of time was just a guess, that he "can't estimate it really," and the jury would have been warranted in finding from certain of his evidence that the time taken in the "look" was much longer than the fraction of a second. He stated that when he first turned his head to look he was in the middle of the intersection of Higgins road and Cumberland avenue and that the collision occurred "probably two hundred feet, maybe a hundred and fifty feet. I am not sure * * * north of the intersection at Cumberland." Defendant further stated that the "look" "ended when I was about fifty feet from him." It is a reasonable inference from his evidence that he was still looking for a street

his entire evidence on the subject of the red stop light that it was on just before the accident but not before. We cannot agree with defendant's contention that for the purposes of the motion to direct a verdict the only reasonable inference that could be drawn from defendant's evidence was that the decedent did not dispel his intention to slow down "with outstretched arm." The witness was vitally interested in the result of the trial, and the jury has the right to closely scrutinize his entire testimony in order to determine the facts surrounding the accident. Because treated over the subjectived in question and defendant did not, it was arranged that defendant should follow freeman, which circumstance required that defendant should pay close attention to the movements of decedent's car. It was pitch dark, there were no other cars upon the road at the time, and decedent had every right to assume that defendant would pay close attention to the movements of the former. Defendant testified that he did not know where Sumpterland road was and that it was because of that fact that decedent took the lead; that when he, defendant, turned his head "to see if it was Sumpterland" he was in the middle of the intersection of Higgins road and Sumpterland avenue. As he did not know the street the only reasonable inference to be drawn from his evidence is that he turned his head in an effort to see a street sign. While he testified that turning his head to the right and back again took a "fraction of a second," he further stated that his estimate of time was just a guess, that he "can't estimate it really," and the jury could have been warranted in finding from certain of his evidence that the time taken in the "look" was much longer than the fraction of a second. He stated that when he first turned his head to look he was in the middle of the intersection of Higgins road and "Sumpterland avenue and that the collision occurred "probably two hundred feet, maybe a hundred and fifty feet. I am not sure * * * north of the intersection at Sumpterland." Defendant further stated that the "head" which I saw about fifty feet from him." It is a reasonable inference from his evidence that he was still looking for a street

sign after he had passed the intersection and that the accident was due to that fact. If defendant, after turning around, again looked at decedent's car when he was about fifty feet from him, as he says he did, why did he run into decedent's moving car? He states that when he looked around again he saw that decedent's car was slowing up but that at the time of the impact decedent's car was still going fifteen miles an hour; that both cars were "going parallel to the edge of the highway" until after the impact; that Higgins road is a broad highway and had two lanes for the northwesterly traffic. Nevertheless, he admits that he made no effort to turn his car to one side, and that he hit the rear end of decedent's car "squarely," "directly in back." If, when he was in the middle of the intersection, he suspected that they were passing Cumberland avenue, he could then have driven alongside of decedent's car and made known his suspicions to decedent. The jury were fully warranted in finding that defendant drove his car directly into the back of decedent's car because he was still looking for a street sign on the street that he had just passed. His negligence caused the death of his friend. We hold that defendant's contention that the trial court should have directed a verdict for defendant is without merit.

While in his brief defendant makes the point that "the verdict of the jury and the judgment entered thereon are contrary to the manifest weight of the evidence in the case," in his argument he concedes that "our point should probably be that the verdict is against the only evidence in the case rather than against the manifest weight of the evidence in the case."

That this case was well tried is evident from the fact that the able and experienced lawyers for defendant are unable to urge errors that are commonly assigned in a case of this kind.

The judgment of the Superior court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

sign after he had passed the intersection and that the accident was due to that fact. If defendant, after turning around, again looked at decedent's car when he was about fifty feet from him, as he says he did, why did he run into decedent's moving car? He states that when he looked around again he saw that decedent's car was slowing up but that at the time of the impact decedent's car was still going fifteen miles an hour; that both cars were "going parallel to the edge of the highway" until after the impact; that Higgins road is a broad highway and had two lanes for the northbound traffic. Nevertheless, he admits that he made no effort to turn his car to one side, and that he hit the rear end of decedent's car "squarely," "directly in back." If, when he was in the middle of the intersection, he suspected that they were passing Cumberland avenue, he could then have driven alongside of decedent's car and made known his suspicions to decedent. The jury was fully warranted in finding that defendant drove his car directly into the back of decedent's car because he was still looking for a street sign on the street that he had just passed. His negligence caused the death of his friend. We hold that defendant's contention that the trial court should have directed a verdict for defendant is without merit.

While in his brief defendant makes the point that "the verdict of the jury and the judgment entered thereon are contrary to the manifest weight of the evidence in the case," in his argument he concedes that "our point should probably be that the verdict is against the only evidence in the case rather than against the manifest weight of the evidence in the case."

That this case was well tried is evident from the fact that the able and experienced lawyers for defendant are unable to urge errors that are commonly assigned in a case of this kind.

The judgment of the superior court of Coos county should be and it is affirmed.

JUDGMENT AFFIRMED.

Bullivan, P. J., and Frank, J., concur.

304 ILL. App.

40469

PETER J. KASPER (Mary Kasper, as assignee of Peter J. Kasper and as Administratrix of the Estate of Peter J. Kasper, substituted as complainant), Appellant, v. DURAND-McNEIL-HORNER COMPANY, HERBERT DELAFIELD, WALTER B. DOWNS, JENNIE E. ALLEN, HARRIETT A. TROWBRIDGE, MABEL D. PINE, BERTHA W. YAGGEY, EDITH COOK DURAND, CAROLYN DURAND and RUTH LEWIS (Defendants), Appellees.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

304 I.A. 579

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 28, 1928, Peter J. Kasper filed a verified bill for an accounting, the purpose of which was to recover certain "bonuses" which he claimed to be due him under a written undertaking of Durand & Kasper Company. On November 17, 1933, an amended and supplemental bill was filed. On April 30, 1934, for a consideration of $525, Peter J. Kasper assigned to William Henry Kasper all proceeds coming to him out of the instant case. On the same date and for the same consideration, William H. Kasper assigned to Mary Kasper all rights acquired by him in the instant case by the assignment from Peter J. Kasper. Peter J. Kasper died April 4, 1938. The original defendants were Durand & Kasper Company, H. C. Durand, Walter B. Downs, Herbert Delafield, Jennie E. Allen, Harriett A. Trowbridge, Mabel D. Pine, Bertha W. Yaggey, Ruth Lewis and Durand-McNeil-Horner Company. These defendants are all made parties defendant in the verified amended and supplemental bill save H. C. Durand, as to whom the bill represents that "said H. C. Durand, whose full name is Harry C. Durand, on or about November 15, 1929, departed this life; that said Harry C. Durand left him surviving as his only heirs at law, his wife, Edith Cook Durand and his daughter Carolyn Durand," who were made parties defendant. The cause was referred to a master, who found that there was due

PETER 1. KAPPER (Harry Kapper, as executor of Peter 1. Kapper and as administrator of the estate of Peter 1. Kapper, substituted as complainant),

Appellant,

v.

EDWARD-WORTH-[illegible] COMPANY, ROBERT DEFAVILLE, ALICE E. DURNAD, JESSIE E. ALICE, [illegible], A. [illegible], ANNA O. [illegible], EDWIN W. [illegible], [illegible] and CHARLES CARLOS DURNAD and [illegible] (Defendants),

Appellees.

[illegible] MAY [illegible]

[illegible] OF [illegible].

80411.4.379

Mr. JUSTICE MCCALL DELIVERED THE OPINION OF THE COURT.

On June 28, 1922, Peter 1. Kapper filed a verified bill for an accounting, the purpose of which was to recover certain "securities" which he claimed to be due him under a written understanding of Durnad & Kapper Company. On November 17, 1921, he amended and supplemented bill was filed. On April 20, 1924, for a consideration of $[illegible], Peter 1. Kapper assigned to William Harry Kapper all appurtenances belonging to him out of the instant case. In the same date and for the same consideration, William H. Kapper assigned to Harry Kapper all rights acquired by him in the instant case by the assignment from Peter 1. Kapper. Prior to Kapper died April 4, 1924. The original defendants were Durnad & Kapper Company, a. C. Durnad, Alice E. Durnad, Robert Defaville, Jessie E. Alice, Harriet A. Overbeige, Ashel O. Alice, Bertha V. Kapper, Julia Davis and Durnad-Davis-Kapper Company. These defendants are all made parties defendant in the verified amended and supplemental bill here H. C. Durnad, as to whom the bill proceeds that "said H. C. Durnad, whose full name is Harry C. Durnad, on or about November 19, 1920, deserted this life; that said Harry C. Durnad left him surviving as his only heirs at law, his wife, Edith Cook Durnad and his daughter Carolyn Durnad," who were made parties defendant. The matter was referred to a master, who found that there was due

complainant $24,700.15, and recommended "that a decree be entered in favor of the complainant and against the defendant, Durand & Kasper Company, in accordance with the prayer of the bill of complaint and the foregoing findings." The master made no recommendations as to any of the other defendants. Plaintiff filed no objections to the master's report. Defendants filed numerous objections, all of which were overruled. By agreement additional testimony was taken before the trial court. The exceptions to the master's report were sustained and the bill of complaint was dismissed for want of equity. Plaintiff appeals.

Plaintiff's claim is based upon the following letter:

"Chicago, May 12, 1913

"Mr. P. J. Kasper

"Dear Sir:

"Confirming our conversation in regard to the bonus to be paid you by the company in addition to your regular salary, I write to state that it is to be on the following basis, viz: An amount equivalent to the net earnings in excess of five per cent on $75000.00 par value of the capital stock of the Company for the year 1913.

"To illustrate: If the Company earned ten per cent applicable to dividends you would receive $3750.00 as a bonus which is five per cent of $75000.00. The amount paid to you as bonus shall be charged to the expense account of the Company.

"Very truly,

"Durand & Kasper Co.
"By H. C. Durand,
"Pres."

It was stipulated that no bonus was paid P. J. Kasper for the year 1913 as the profits of the company for said year were not sufficient to entitle him to a bonus for said year under the terms of the aforesaid letter; that no bonus was paid to anyone, other than P. J. Kasper, for the year 1914; and no bonuses were paid to anyone prior to 1914; "that for the years 1915, 1916, 1917 and 1918, respectively, P. J. Kasper's bonus was computed before the aggregate amount of the bonuses paid to others, than Kasper, for said respective years, were first deducted from earnings; but that in computing P. J. Kasper's bonus for the year 1919, the aggregate amount of the bonuses paid to others, than Kasper, for said year was first deducted from the earnings of the company; that

complainant $54,700.17, and recommended "that a decree be entered in favor of the complainant and against the defendant, Durand & Kasper Company, in accordance with the prayer of the bill of complaint and the foregoing findings." The master made no recommendations as to any of the other defendants. Plaintiff filed no objections to the master's report. Defendants filed numerous objections, all of which were overruled. By agreement additional testimony was taken before the trial court. The exceptions to the master's report were overruled and the bill of complaint was dismissed for want of equity. Plaintiff appeals.

Plaintiff's claim is based upon the following letter:

"Chicago, May 14, 1913

"Mr. F. J. Kasper

"Dear Sir:

"Confirming our conversation in regard to the bonus to be paid you by the company in addition to your regular salary, I write to state that it is to be on the following basis, viz: An amount equivalent to the net earnings in excess of five per cent on $75000.00 par value of the capital stock of the Company for the year 1913.

"To illustrate: If the Company earned ten per cent applicable to dividends you would receive $3750.00 as a bonus which is five per cent of $75000.00. The amount paid to you as bonus shall be charged to the expense account of the Company.

"Very truly,

"Durand & Kasper Co.,
"By H. O. Durand,
"Pres."

It was stipulated that no bonus was paid F. J. Kasper for the year 1913 as the profits of the company for said year were not sufficient to entitle him to a bonus for said year under the terms of the aforesaid letter; that no bonus was paid to anyone, other than F. J. Kasper, for the year 1914; and no bonuses were paid to anyone prior to 1914; "that for the years 1913, 1916, 1917 and 1918, respectively, F. J. Kasper's bonus was computed before the aggregate amount of the bonuses paid to others, then Kasper, for said years, then in computing F. J. Kasper's bonus for the year 1913, the aggregate amount of the bonuses paid to others, then Kasper, for said year was first deducted from the earnings of the company; that earnings; but that in computing F. J. Kasper's bonus for the year 1913,

P. J. Kasper's bonus for the year 1919, computed as it was for said year, that is, after first deducting from earnings the aggregate amount of the bonuses paid to others, amounted to the sum of $62,328.75. He, however, was paid as a bonus for said year the sum of $63,000.00." It was further stipulated that "if P. J. Kasper's bonus for each of the years 1915, 1916, 1917 and 1918, respectively, had been computed as it was in 1919, that is, after deducting the bonuses paid to others for said year, then the aggregate amount of his bonuses for said years 1915, 1916, 1917 and 1918 would be $7,537.50 less than if computed as said bonus was for said years, that is, without first deducting from earnings the aggregate amount of bonuses paid to others for said respective years, as shown by the following tabulation, to-wit:

Year	Column 1. Bonuses paid to others for years designated	Column 2. 7500/500,000 thereof as per bonus agreement	Column 3. Less 25% of Col. 2 to which Kasper is entitled to on acct. of stock distribution under terms of consolidation agreement	Column 4. Claimed bonus reduction for years designated
1915	$ 9,000.00	$ 1,350.00	$ 337.50	$1,012.50
1916	20,000.00	3,000.00	750.00	2,250.00
1917	19,500.00	2,925.00	731.25	2,193.75
1918	18,500.00	2,775.00	693.75	2,081.25
	$67,000.00	$10,050.00	$ 2,512.50	$7,537.50"

It was further stipulated "that P. J. Kasper claims that his bonus for 1919 should have been computed as his said bonus was for the years 1915, 1916, 1917 and 1918, that is, without first deducting the bonuses paid others for said respective years; and that not having so computed it, he was paid $6,660.00 less than he should have been paid by reason of such computation, as shown calculated in the following tabulation, to-wit:

Year	Column 1. Bonus paid to others for 1919	Column 2. 7500/500,000 thereof as per bonus agreement	Column 3. Less 25% of Col. 2 to which Kasper is entitled on acct. of stock distribution under terms of consolidation agreement	Column 4. Amount Kasper claims by reason above method of computation
1919	$59,200.00	$8,880.00	$2,220.00	$6,660.00"

P. J. Kasper's bonus for the year 1919, computed as it was for said year, that is, after first deducting from earnings the aggregate amount of the bonuses paid to others, amounted to the sum of $62,328.75. He, however, was paid as a bonus for said year the sum of $63,000.00."

It was further stipulated that "If P. J. Kasper's bonus for each of the years 1915, 1916, 1917 and 1918, respectively, had been computed as it was in 1919, that is, after deducting the bonuses paid to others for said year, then the aggregate amount of his bonuses for said years 1915, 1916, 1917 and 1918 would be $7,537.50 less than it computed as said bonus was for said years, that is, without first deducting from earnings the aggregate amount of bonuses paid to others for said respective years, as shown by the following tabulation, to-wit:

Column 1.	Column 2.	Column 3.	Column 4.
Bonuses paid to others for years designated	75%\500,000 thereof as per bonus agreement	Less 25% of Col. 2 to which Kasper is entitled on acct. of stock distribution under terms of consolidation agreement	Claimed bonus reduction for years designated
1915 $ 9,000.00	$ 1,350.00	$ 337.50	$1,012.50
1916 20,000.00	3,000.00	750.00	2,250.00
1917 19,200.00	2,922.00	731.25	2,193.75
1918 18,900.00	2,877.00	719.25	2,157.75
$67,000.00	$10,050.00	$ 2,512.50	$7,537.50"

It was further stipulated "that P. J. Kasper claims that his bonus for 1919 should have been computed as his said bonus was for the years 1915, 1916, 1917 and 1918, that is, without first deducting the bonuses paid others for said respective years; and that not having so computed it, he was paid $6,000.00 less than he should have been paid by reason of such computation, as shown calculated in the following tabulation, to-wit:

Column 1.	Column 2.	Column 3.	Column 4.
Bonus paid to others for 1919	75%\500,000 thereof as per bonus agreement	Less 25% of Col. 2 to which Kasper is entitled on acct. of stock distribution under terms of consolidation agreement	Amount Kasper claims by reason above method of computation

It was further stipulated "that Kasper owned in 1913 and continuously thereafter up to and at the time of the consolidation and merger of Durand & Kasper Co. with McNeil and Higgins Company and Henry Horner & Co., one-fourth of the outstanding capital stock of Durand & Kasper Co." Kasper received the following bonuses: 1914, $17,370; 1915, $18,690; 1916, $35,433; 1917, $30,607.50; 1918, $16,245; 1919, $63,000; 1920, None (loss year). Plaintiff claims that upon a proper construction of the letter of May 12, 1913, Kasper was entitled to have his bonuses calculated on the net earnings of the company before any bonuses given to others in the year 1919 were deducted; that as the net earnings of Durand & Kasper Company for the year 1919 are stipulated, it follows that if plaintiff's construction of the letter of May 12, 1913, is to be followed, Kasper was entitled to an additional amount for the year 1919. Plaintiff further claims that for the years 1915, 1916, 1917 and 1918 the parties, in determining the bonus due Kasper, followed plaintiff's interpretation of the said letter, and that it is the duty of the courts to adopt the contemporaneous construction of the contract by the parties.

The material facts, all of which are practically undisputed, are: Durand & Kasper Company, incorporated in 1893 under the laws of this State, was engaged in the wholesale grocery business until its consolidation with two other companies on September 9, 1921. The capital stock of the company was $500,000, divided into 5,000 shares of $100 par value each. For many years prior to the consolidation Kasper owned 1,250 shares of the stock of the company. During the entire existence of the company he was a member of the board of directors. He was elected second vice president at the first meeting of the said board and held that office until July 15, 1897, on which date he was elected treasurer, which office he held until January 26, 1907, when he was elected first vice president, which office he held until the consolidation. During the existence of the company fifty-three stockholders' meetings were held and Kasper attended them all. During the same period he attended all of the directors' meetings,

It was further stipulated "that Kasper owned in 1913 and continuously thereafter up to and at the time of the consolidation and merger of Durand & Kasper Co. with Mohell and Higgins Company and Henry Horner & Co., one-fourth of the outstanding capital stock of Durand & Kasper Co." Kasper received the following bonuses: 1914, $17,376; 1915, $25,000; 1916, $17,413; 1917, $34,007.75; 1918, [illegible]; 1919, $63,000; 1920, None (loss year). Plaintiff claims that upon a proper construction of the letter of May 12, 1913, Kasper was entitled to have his bonuses calculated on the net earnings of the company before any bonuses given to others in the year 1919 were deducted; that as the net earnings of Durand & Kasper Company for the year 1919 are stipulated, it follows that if plaintiff's construction of the letter of May 12, 1913, is to be followed, Kasper was entitled to an additional amount for the year 1919. Plaintiff further claims that for the years 1915, 1916, 1917 and 1918 the parties, in determining the bonus due Kasper, followed plaintiff's interpretation of the said letter, and that it is the duty of the courts to adopt the contemporaneous construction of the contract by the parties.

The material facts, all of which are practically undisputed, are: Durand & Kasper Company, incorporated in 1913 under the laws of this state, was engaged in the wholesale grocery business until its consolidation with two other companies on September 9, 1921. The capital stock of the company was $250,000, divided into 2,000 shares of $100 par value each. For many years prior to the consolidation Kasper owned 1,250 shares of the stock of the company. During the entire existence of the company he was a member of the board of directors. He was elected second vice president at the first meeting of the said board and held that office until July 15, 1897, on which date he was elected treasurer, which office he held until January 30, 1907, when he was elected first vice president, which office he held until the consolidation. During the existence of the company fifty-three stockholders' meetings were held and Kasper attended them all. During the same period he attended all of the directors' meetings,

seventy-one in number. On October 22, 1898, Kasper was elected as one of the three members of the "Board Rate Committee," and he remained a member of that committee until the consolidation. The by-laws provided that the board rate committee should examine, in each January, the books and balance sheet of the corporation and certify to the secretary, in writing, the value of each share of stock, such value to be determined by adding to the par value the proportion of all surplus funds and undivided profits and deducting the proportion of all losses and of the guarantee fund as fixed by the directors applicable to such stock. The by-laws further provided that a balance sheet from the books of the company should be made during the month of January showing the actual condition of the corporation on the first day of January in each year. On May 12, 1913, the letter heretofore referred to was written. On March 11, 1914, at a meeting of the board of directors the following occurred: "Profit and loss and balance sheet of December 31, 1913, was read and unanimously approved," and a motion was made and seconded "that the special arrangement with Mr. P. J. Kasper for the year 1913, as evidenced by a letter of May 12, 1913, signed by Mr. H. C. Durand, Pres., be in force for the year 1914," which motion was unanimously carried. On January 29, 1915, at a meeting of the board of directors, the following occurred: "Profit and loss and balance sheet was presented, showing the condition of the business on December 31, 1914, and upon the motion of Peter J. Kasper, duly seconded, it was unanimously approved and ordered placed on file; and on motion of Peter J. Kasper, duly seconded, a dividend for the year 1914, at the rate of 15 per cent on the capital stock of the corporation was unanimously declared, the same to be paid as of January 1, 1915; and it was further moved that the balance of the undivided profits, amounting to $48,450.72, be credited to surplus account, which motion was unanimously carried. Motion of Peter J. Kasper, duly seconded, that 'the special arrangement with Peter J. Kasper, as evidenced by letter of May 12, 1913, on file, be continued

seventy-one in number. On October 22, 1898, Kasper was elected as one of the three members of the "Board Rate Committee," and he remained a member of that committee until the consolidation. The by-laws provided that the board rate committee should examine, in each January, the books and balance sheet of the corporation and certify to the secretary, in writing, the value of each share of stock, such value to be determined by adding to the par value the proportion of all surplus funds and undivided profits and deducting the proportion of all losses and of the guarantee fund as fixed by the directors applicable to such stock. The by-laws further provided that a balance sheet from the books of the company should be made during the month of January showing the actual condition of the corporation on the first day of January in each year. On May 12, 1913, the letter heretofore referred to was written. On March 11, 1914, at a meeting of the board of directors the following occurred: "Profit and loss and balance sheet of December 31, 1913, was read and unanimously approved," and a motion was made and seconded "that the special arrangement with Mr. P. J. Kasper for the year 1913, as evidenced by a letter of May 12, 1913, signed by Mr. H. C. Durand, Pres., be in force for the year 1914," which motion was unanimously carried. On January 29, 1915, at a meeting of the board of directors, the following occurred: "Profit and loss and balance sheet was presented, showing the condition of the business on December 31, 1914, and upon the motion of Peter J. Kasper, duly seconded, it was unanimously approved and ordered placed on file; and on motion of Peter J. Kasper, duly seconded, a dividend for the year 1914, at the rate of 15 per cent on the capital stock of the corporation was unanimously declared, the same to be paid as of January 1, 1915; and it was further moved that the balance of the undivided profits, amounting to $43,490.75, be credited to surplus account, which motion was unanimously carried. Motion of Peter J. Kasper, duly seconded, that 'the special arrangement with Peter J. Kasper, as evidenced by letter of May 12, 1913, on file, be continued

during the year 1915' was unanimously carried." On January 27, 1916, at a meeting of the board of directors, the following occurred: "Profit and loss and balance sheet of December 31, 1915, was presented and, on motion of Peter J. Kasper, duly seconded, was unanimously approved and ordered placed on file. On motion of P. J. Kasper, duly seconded, a dividend for the year 1915 of 20 per cent on the capital stock of the corporation was unanimously declared, the same to be paid as of January 1, 1916; and it was further moved and unanimously carried that the balance of the undivided profits, amounting to $21,925.72, be credited to surplus account. Motion was made by Herbert Delafield, seconded by Peter J. Kasper, that 'the special arrangement with Peter J. Kasper be continued this year, as evidenced by letter of May 12, 1913, on file,' which motion was unanimously approved." At a meeting of the board of directors held January 31, 1917, the following occurred: "The profit and loss and balance sheet of December 30, 1916, was presented and, on motion of Peter J. Kasper, duly seconded, was unanimously approved. The action of the officers in paying the following additional salary and bonus to officers and department managers was unanimously approved: P. J. Kasper, additional salary, $2,000.00; H. C. Durand, additional salary, $2,000.00; Peter J. Kasper, Bonus, $35,433.00, as per special arrangement May 12, 1913; H. C. Durand, Bonus, $5,500.00; W. B. Downs, Bonus, $1,500.00; H. Delafield, Bonus, $4,000.00; J. E. Stephan, Bonus, $3,000.00; R. Walsh, Bonus, $1,000.00. Upon the motion of H. C. Durand, seconded by P. J. Kasper and unanimously carried, it was moved 'that the special arrangement with Peter J. Kasper, evidenced by letter of May 12, 1913, be continued.'" At a meeting of the board of directors held on April 29, 1918, the following occurred: "Profit and loss and balance sheet was submitted and unanimously approved, and the action of the officers in paying the following bonuses was also unanimously approved: Peter J. Kasper, Bonus, $30,607.50, as per special arrangement May 12, 1913; Henry C. Durand, Bonus, $6,000.00; Herbert Delafield, Bonus, $4,000.00; Walter B. Downs, Bonus, $1,500.00; Wm. J. Schreinier, Bonus, $1,000.00;

During the year 1919' was unanimously carried. On January 4th, 1920, at a meeting of the board of directors, the following occurred: "Profit and loss and balance sheet of December 31, 1919, was presented and, on motion of Peter G. Kasper, duly seconded, was unanimously approved and ordered placed on file. On motion of P. G. Kasper, duly seconded, a dividend for the year 1919 of 20 per cent on the capital stock of the corporation was unanimously declared, the same to be paid as of January 1, 1919; and it was further moved and unanimously carried that the balance of the undivided profits, amounting to $21,292.72, be credited to surplus account. Motion was made by Herbert Delafield, seconded by Peter G. Kasper, that 'the special arrangement with Peter G. Kasper be continued this year, as evidenced by letter of May 12, 1919, on file,' which motion was unanimously approved." At a meeting of the board of directors held January 12, 1919, the following occurred: "The profit and loss and balance sheet of December 31, 1919, was presented and, on motion of Peter G. Kasper, duly seconded, was unanimously approved. The action of the officers in paying the following additional salary and bonus to officers and department managers was unanimously approved: P. G. Kasper, additional salary, $4,000.00; R. C. Durand, additional salary, $2,500.00; Peter G. Kasper, Bonus, $35,433.00, as per special arrangement May 12, 1919; E. O. Durand, Bonus, $2,500.00; T. E. Owens, Bonus, $2,750.00; H. Delafield, Bonus, $4,000.00; J. H. Stephen, Bonus, $3,000.00; R. Malik, Bonus, $1,500.00. Upon the motion of R. C. Durand, seconded by P. G. Kasper, and unanimously carried, it was moved 'that the special arrangement with Peter G. Kasper, referred to in letter of May 12, 1919, be continued.'" At a meeting of the board of directors held on April 29, 1919, the following occurred: "Profit and loss and balance sheet was submitted and unanimously approved, and the action of the officers in paying the following bonuses was also unanimously approved: Peter G. Kasper, Bonus, $35,433.00, as per special arrangement May 12, 1919; Henry C. Durand, Bonus, $4,000.00; Herbert Delafield, Bonus, $4,000.00; Walter E. Owens, Bonus, $2,500.00; Wm. J. Schreiner, Bonus, $2,000.00;

Richard Walsh, Bonus, $3,000.00; John E. Stephan, Bonus, $3,000.00; E. U. Plant, Bonus, $1,000.00. Upon motion of Peter J. Kasper, duly seconded, it was unanimously carried that the officers' salaries be fixed as last year, 'also the special arrangement with Peter J. Kasper, evidenced by letter of May 12, 1913, was continued.' On motion of Peter J. Kasper, duly seconded, a dividend of 25 per cent was declared." At a meeting of the board of directors held on April 8, 1919, the following occurred: "The profit and loss and balance sheet of December 31, 1918, was submitted and approved. On motion of Peter J. Kasper, duly seconded and unanimously carried, a dividend of 16 per cent was declared. On motion duly made and unanimously carried the action taken on November 4, 1918, of transferring the undivided profits of $259,768.42 to surplus account was approved. On motion duly made and unanimously carried the payment on December 31, 1918, of the following list of bonuses was approved: H. C. Durand, $6,000.00; Peter J. Kasper, $16,245.00; H. Delafield, $6,000.00; W. B. Downs, $1,500.00; R. Walsh, $3,000.00; E. U. Plant, $1,000.00; W. J. Schreinier, $1,000.00. It was moved by Mr. Knight and seconded by Mr. Delafield that the officers' salaries be the same as last year, 'including the special arrangement with Peter J. Kasper, evidenced by letter of May 12, 1913,' which motion was unanimously carried." The meeting of the board of directors held on May 26, 1920, is an important one in passing upon plaintiff's claim. The following there occurred: "The profit and loss and balance sheet of December 31, 1919, was unanimously approved and ordered placed on file. On motion of Peter J. Kasper, duly seconded and unanimously carried, a dividend of 30 per cent on the capital stock was declared. It was moved by Mr. Knight, seconded by Peter J. Kasper, that $193,862.04 be credited to surplus account and charged to undivided profits, which motion was unanimously carried. Mr. Knight moved, seconded by Mr. Delafield, that 'the special arrangement with P. J. Kasper, evidenced by letter of May 12, 1913, be renewed for the present year,' which was unani-

Midland Valley Company, $3,000.00; John E. Hughes, Dormer, $3,000.00; K. V. Plant, Dormer, $1,000.00. Upon motion of Peter T. Kasper, duly seconded, it was unanimously carried that the officers' salaries be fixed as last year, 'also the special arrangement with Peter T. Kasper, evidenced by letter of May 12, 1913, was continued.' On motion of Peter T. Kasper, duly seconded, a dividend of 15 per cent was declared." At a meeting of the board of directors held on April 6, 1914, the following occurred: "The profit and loss and balance sheet of December 31, 1913, was submitted and approved. On motion of Peter T. Kasper, duly seconded and unanimously carried, a dividend of 15 per cent was declared. On motion duly made and unanimously carried the action taken on November 4, 1913, of transferring the undivided profits of $229,768.42 to surplus account was approved. On motion duly made and unanimously carried the payment on December 31, 1913, of the following list of bonuses was approved: K. C. Durand, $2,000.00; Peter T. Kasper, $16,242.00; E. Delafield, $6,000.00; W. E. Dower, $1,250.00; E. Walsh, $3,000.00; E. V. Plant, $1,000.00; K. T. Schreiner, $1,000.00. It was moved by Mr. Knight and seconded by Mr. Delafield that the officers' salaries be the same as last year, 'including the special arrangement with Peter T. Kasper, evidenced by letter of May 12, 1913,' which motion was unanimously carried." The meeting of the board of directors held on May 26, 1920, is an important one in passing upon plaintiff's claim. The following there occurred: "The profit and loss and balance sheet of December 31, 1919, was unanimously approved and ordered placed on file. On motion of Peter T. Kasper, duly seconded and unanimously carried, a dividend of 30 per cent on the capital stock was declared. It was moved by Mr. Knight, seconded by Peter T. Kasper, that $40,000.00 be credited to surplus account and charged to undivided profits, which motion was unanimously carried. Mr. Knight moved, seconded by Mr. Delafield, that 'the special arrangement with P. T. Kasper, evidenced by letter of May 12, 1913, be renewed for the present year,' which was unani-

mously approved. The following bonuses paid December 31, 1919, were unanimously approved: Peter J. Kasper, $63,000.00; Henry C. Durand, $15,000.00; Herbert Delafield, $20,000.00; Walter B. Downs, $3,000.00; R. Walsh, $9,000.00; J. E. Stephan, $3,000.00; J. W. Souders, $1,000.00; P. Schlander, $1,500.00; P. Fields, $600.00; Robert Kasper, $1,500.00; T. D. Gray, $1,000.00; E. U. Plant, $1,500.00; Geo. Schlidge, $600.00; J. A. Popp, $1,500.00; W. J. Schreinier, $2,500.00; A. N. Whitman, $900.00; T. A. Hoy, $600.00; A. W. Holmberg, $600.00." At a meeting of the board held on March 1, 1921, the annual profit and loss and balance sheet of December 31, 1920, was unanimously approved. On September 9, 1921, Durand & Kasper Company consolidated with McNeil, Higgins & Company and Henry Horner & Company, forming Wholesale Grocers' Association, which name was afterward changed to Durand-McNeil-Horner Company. In connection with the process of consolidation, at a meeting of the board of directors of Durand & Kasper Company on August 8, 1921, the chairman of the meeting stated that Durand & Kasper Company was indebted to the following named persons in the amounts set opposite their respective names, as follows: Estate of Calvin Durand, $200,000; Henry C. Durand et al. $75,000; Herbert Delafield, $12,500; P. J. Kasper, $100,000, and that said persons had offered to accept in payment of the indebtedness shares of the capital stock of the new company, at par, equal to the amount of such indebtedness; that the matter was discussed and thereupon a resolution was passed and approved by all of the directors, including the complainant, that the offer of the above named persons to accept shares of capital stock of the new company in payment of Durand & Kasper Company's indebtedness to each of them be accepted. Kasper signed the minutes of the meeting and the $100,000 due him was subsequently paid to him by the issuance of first preferred stock of the new consolidated company. In the consolidation agreement it was further provided that the stockholders of Durand & Kasper Company should receive stock in the consolidated company based on the net value of the assets of Durand & Kasper Company. In ascertaining such value

monthly payroll. The following dividends paid December 31, 1921, were unanimously approved: John T. Harper, $24,000.00; Harry C. Dennis, $12,000.00; Harper Materials, $6,000.00; Walter S. Jones, $1,500.00; R. Walsh, $8,000.00; J. T. Stephens, $3,000.00; F. V. Roberts, $2,000.00; F. Hallander, $1,700.00; F. Tracy, $500.00; Robert Harper, $1,500.00; I. S. Grey, $1,000.00; T. E. Flaxy, $2,500.00; Geo. Hallden, $50.00; A. Fox, $1,500.00; S. J. Somerville, $3,500.00; F. J. Williams, $500.00; E. A. Roy, $600.00; A. E. Holmberg, $600.00." At a meeting of the board held on March 1, 1921, the annual profit and loss and balance sheet of December 31, 1920, was unanimously approved. On September 3, 1921, Durand & Harper Company consolidated with Morell Engine & Company and Harper Motor & Company, forming Midwestern Motors' Association, which name was afterward changed to Durand-Morell-Harper Company. In connection with the process of consolidation, at a meeting of the board of directors of Durand & Harper Company on August 8, 1921, the minutes of the meeting stated that Durand & Harper Company was indebted to the following named persons in the amounts set opposite their respective names, as follows: Public of Little Dorset, $30,000; Harry C. Dennis et al, $21,000; Herbert Materials, $1,500; J. V. Harper, $100,000, and that said persons had offered to accept in payment of the indebtedness shares of the capital stock of the new company, at par, equal to the amount of such indebtedness; that the matter was discussed and thereupon a resolution was passed and approved by all of the directors, including the complainant, that the offer of the above named persons to accept shares of capital stock of the new company in payment of Durand & Harper Company's indebtedness to each of them be accepted. Harper signed the minutes of the meeting and the $150,000 due him was subsequently paid to him by the issuance of first preference stock of the new consolidated company. In the consolidation agreement it was further provided that the stockholders of Durand & Harper Company should receive stock in the consolidated company based on the net value of the assets of Durand & Harper Company. In ascertaining such value

all bills and accounts receivable and claims against railroads and others which had been written off the books of Durand & Kasper Company and which did not appear thereon on July 1, 1921, but which were collected and recovered during the period from July 1, 1921, to July 1, 1922, were credited and added to the assets of that company and considered in determining the net value of its assets. Kasper received credit for such collections in the amount of the stock of the consolidated company which he received. After July 1, 1922, when the stock settlement was made by the new consolidated company with the stockholders of the consolidating companies, the remaining uncollected accounts were placed in trust accounts with the new company, the account for the former stockholders of Durand & Kasper Company being known as Trust Account No. 95. On February 8, 1923, the following letter was addressed to the new company:

"Durand-McNeil-Horner Company,
"301 East Grand Avenue,
"Chicago, Illinois.

"Gentlemen:

"We, the undersigned, stockholders of Durand & Kasper Company, hereby authorize you to pay and distribute to our respective accounts with you, our pro rata share of the money which you now hold or which may hereafter be paid into and received by you in the trust fund held for the stockholders of said Durand & Kasper Company.

"Yours truly,
"Henry Calvin Durand,
"Peter J. Kasper,
"Herbert Delafield,
"Walter B. Downs."

From 1923 to 1927 ten distributions, aggregating $71,850, out of said trust account, were made to the former stockholders of Durand & Kasper Company, Kasper receiving $17,850. It is undisputed that he made no objection to the amounts that he or the other stockholders in the old company received. Kasper was active in the collection of funds that were placed in the trust account and evidence introduced by defendants shows that three-quarters of the distributions were made at his suggestion. He was a director and a stockholder in the new company until February 7, 1927. On September 19, 1921, he was elected a member of the executive committee of the new company; and on December 10, 1921,

all bills and accounts receivable and claims against railroads and others which had been written off the books of Durand & Kasper Company and which did not appear thereon on July 1, 1921, but which were collected and recovered during the period from July 1, 1921, to July 1, 1922, were credited and added to the assets of that company and considered in determining the net value of its assets. Kasper received credit for such collections in the amount of the stock of the unnamed- dated company which he received. After July 1, 1922, when the stock settlement was made by the new consolidated company with the stockholders of the consolidating companies, the remaining uncollected accounts were placed in trust accounts with the new company, the account for the former stockholders of Durand & Kasper Company being known as Trust Account No. 95. On February 8, 1923, the following letter was addressed to the new company:

"Durand-McNeil-Burner Company,
"301 East Grand Avenue,
"Chicago, Illinois.

"Gentlemen:

"We, the undersigned, stockholders of Durand & Kasper Company, hereby authorize you to pay and distribute to our respective accounts with you, our pro rata share of the money which you now hold or which may hereafter be paid into and received by you in the trust fund held for the stockholders of said Durand & Kasper Company.

"Yours truly,
"Henry Calvin Durand,
"Peter J. Kasper,
"Herbert Delafield,
"Walter H. Downs."

From 1923 to 1927 ten distributions, aggregating $71,890, out of said trust account, were made to the former stockholders of Durand & Kasper Company, Kasper receiving $17,890. It is undisputed that he made no objection to the amounts that he or the other stockholders in the old company received. Kasper was active in the collections of funds that were placed in the trust account and evidence introduced by defendants shows that three-quarters of the distributions were made at his suggestion. He was a director and a stockholder in the new company until February 7, 1927. On September 19, 1921, he was elected a member of the executive committee of the new company; and on December 12, 1921,

he was elected general manager, and on February 22, 1922, he was elected vice president, which offices he held until May 22, 1922. No claim was filed by Kasper against the estate of Henry C. Durand during the administration of his estate.

It is clear that the letter of May 12, 1913, was understood by all of the parties to be a contract for one year only, which would lapse unless extended by action of the board. Kasper, upon several occasions, moved that the special arrangement evidenced by the letter of May 12, 1913, be continued for another year.

Arthur E. Holmberg, a witness for plaintiff, was connected with the collection and credit department of Durand & Kasper Company. He testified that it was his custom to submit copies of the balance sheets to Kasper before board meetings and that he was prepared to explain the balance sheets to Kasper and the other directors, if called upon to do so. The record shows that it was the custom to submit a "profit and loss and balance sheet" to the board, and that on a number of occasions Kasper moved for the approval of the same. Plaintiff concedes that Henry C. Durand did not devote his entire time to the business, because of ill health.

Defendants contend, inter alia, that the record shows that Kasper attended all of the directors' and stockholders' meetings of Durand & Kasper Company from its inception until the consolidation in 1921; that he was the dominant person at said meetings and made practically all of the important motions; that as an officer, director, and member of the board rate committee he had access to the financial data of the company, not only before the directors' meetings at which the bonuses were voted, but at all times; that he voted for all of the bonuses after he had been furnished with balance sheets and income statements by Holmberg prior to the meetings at which the bonuses were voted; that no other reasonable conclusion can be drawn from the evidence than that he voted for the bonuses with full knowledge of the facts; that, aside from the fact that he had such actual knowledge as a

he was elected general manager, and on February 20, 1912, he was elected vice president, which offices he held until Jan 20, 1916. No claim was filed by Kasper against the estate of Henry C. Durand during the administration of his estate.

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Defendants contend, inter alia, that the record shows that Kasper attended all of the directors' and stockholders' meetings of Durand & Kasper Company from its inception until the consolidation in 1921; that he was the dominant person at said meetings and made practically all of the important motions; that as an officer, director, and member of the board rate committee he had access to the financial data of the company, not only before the directors' meetings at which the bonuses were voted, but at all times; that he voted for all of the bonuses after he had been furnished with balance sheets and income statements by Holmberg prior to the meetings at which the bonuses were voted; that no other reasonable conclusion can be drawn from the evidence than that he voted for the bonuses with full knowledge of the facts; that, aside from the fact that he had such actual knowledge as a

director, he was chargeable with knowledge of the financial condition of the company and the method of computing his bonus; that at the time of the consolidation, in which Kasper took an active part, the assets and liabilities of Durand & Kasper Company and the other consolidating companies were definitely determined and set forth; that stock in the consolidated company was issued to the stockholders of Durand & Kasper Company in accordance with such determination and by the express consent and agreement of Kasper and the other stockholders; that by his participation in the consolidation agreements Kasper is estopped from claiming any further bonus; that Kasper accepted ten distributions of the proceeds of Trust Account No. 95 on the basis of his pro rata share of stock ownership over the period from 1923 to 1927 without objection, and that he was instrumental in collecting many of the items recovered into the trust account and usually caused the distributions of the proceeds of Trust Account No. 95 to be made.

While plaintiff, in her brief, intimates that there was a bold attempt to deceive or defraud Kasper out of moneys which were due him, upon the oral argument her counsel conceded that there was no evidence to support a theory of fact that fraud had been practiced upon Kasper. Plaintiff concedes that Kasper was the "predominant factor in the Durand & Kasper Company," but contends that his work of buying merchandise on the one hand and supervising the selling of it on the other, "gave him no time to supervise or study the bookkeeping features of the business and left him unfamiliar with such subjects." The fact that Kasper attended all of the directors' and stockholders' meetings during the existence of Durand & Kasper Company shows that he paid close attention to the affairs of the corporation. As a member of the board rate committee it was his duty to examine the books of the corporation and to ascertain the actual condition of the corporation. As heretofore stated, when "profit and loss and balance sheets" were presented to the board Kasper on a number of occasions moved for the approval of the same. As further tending to prove that he was familiar with the condition of the company, it appears that all motions for the

director, he was chargeable with knowledge of the financial condition of the company and the method of conducting his bonus; that at the time of the consolidation, in which Kasper took an active part, the assets and liabilities of Durand & Kasper Company and the other consolidating companies were definitely determined and set forth; that stock in the consolidated company was issued to the stockholders of Durand & Kasper Company in accordance with such determination and by the express consent and agreement of Kasper and the other stockholders; that by his participation in the consolidation agreements Kasper is estopped from claiming any further bonus; that Kasper accepted his distributions of the proceeds of Trust Account No. 95 on the basis of his pro rata share of stock ownership over the period from 1923 to 1927 without objection, and that he was instrumental in collecting many of the items recovered into the trust account and usually caused the distributions of the proceeds of Trust Account No. 95 to be made.

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payment of dividends were made by Kasper. At the time of the bonus payments Calvin Durand was deceased and Henry C. Durand was unable to devote much time to the business of the company because of illness.

It will be noted that while the amended and supplemental bill prays for an accounting against Durand & Kasper Company, Walter B. Downs, Herbert Delafield, Jennie E. Allen, Harriett A. Trowbridge, Mabel D. Pine, Bertha W. Yaggey, Ruth Lewis, Edith Cook Durand, Carolyn Durand and Durand-McNeil-Horner Company, the master found that plaintiff was entitled to an accounting from defendant Durand & Kasper Company, and recommended "that a decree be entered in favor of the complainant and against the defendant, Durand & Kasper Company, in accordance with the prayer of the bill of complaint and the foregoing findings." As plaintiff filed no objections to the master's report she acquiesced in the master's findings and recommendations and abandoned her claim for an accounting against the other defendants.

After a careful review of the record we have reached the conclusion that defendants' contentions, above stated, are meritorious, and that Kasper's actions as a stockholder, director and official of Durand & Kasper Company, preclude the assertion of the instant claim.

In our opinion Kasper was paid for the year 1919 the bonus to which he was entitled under the letter of May 12, 1913. But plaintiff argues that for the years 1915, 1916, 1917 and 1918 Durand & Kasper Company construed the letter to mean that the bonus of Kasper was to be calculated on the company's earnings for each of the years before any bonuses voted to other persons were deducted, and that it is the duty of the court to adopt the interpretation which the parties themselves placed upon the letter during the four years in question. Defendants contend that the contract is not ambiguous and therefore the rule relied upon by plaintiff does not apply. Defendants argue that the last paragraph of the letter of May 12, 1913, makes it perfectly clear that Kasper's bonus must be determined in relation to net earnings "applicable to dividends," and they cite authorities that hold that net proceeds available for dividends are those which remain after deducting

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In our opinion Kasper was paid for the year 1919 the bonus to which he was entitled under the letter of May 12, 1913. But plaintiff argues that for the years 1913, 1914, 1917 and 1919 Durand & Kasper Company construed the letter to mean that the bonus of Kasper was to be calculated on the company's earnings for each of the years before any bonuses voted to other persons were deducted, and that it is the duty of the court to adopt the interpretation which the parties themselves placed upon the letter during the four years in question. Defendants contend that the contract is not ambiguous and therefore the rule relied upon by plaintiff does not apply. Defendants argue that the last paragraph of the letter of May 12, 1913, makes it perfectly clear that Kasper's bonus must be determined in relation to net earnings "applicable to dividends," and that the authorities that hold that net proceeds available for dividends are those which remain after deducting

all expenses which have been incurred and all losses which have been sustained, and defendants insist that the bonuses paid to other parties for the year 1919 were a part of the expenses of the company, and, therefore, the manner of calculating Kasper's bonus for the year 1919, by the board of directors, was in accordance with the contract, and the manner of computing Kasper's bonuses for the years 1915, 1916, 1917 and 1918 was not in accordance with the contract. Defendants further contend that even if the doctrine of interpretation by the parties has any application to the instant case it appears that the directors at the meeting on May 26, 1920, gave a different interpretation to the contract than the one they had given it during the years 1915, 1916, 1917 and 1918. Plaintiff's answer to this argument is that the interpretation placed upon the contract at the meeting of May 26, 1920, was "without the knowledge, approval or consent of Kasper." We are satisfied that the facts do not sustain this position of plaintiff. It is conceded that the amount of the bonus paid Kasper for the year 1919, $63,000, was reached by computing Kasper's bonus after the bonuses paid to others had been deducted, and then arbitrarily adding to the amount reached the sum of $671.25 to make a round figure of $63,000. As defendants state, an examination of the "profit and loss and balance sheet" presented at the meeting of the board of directors on May 26, 1920, would have shown just how his bonus was determined. Plaintiff's counsel admits that the even figure, $63,000, might look like "a strange coincidence," but that it was not sufficient to arouse in Kasper a suspicion that his associates were subjecting him to any fraudulent practices. As heretofore stated, the fraud charges were abandoned by plaintiff upon the oral argument. No other reasonable conclusion can be reached from the record than that Kasper, at the meeting of the board of directors held on May 26, 1920, understood the method of computing his bonus and approved the same.

It appears that in the year 1927 the Federal Government refunded to Durand & Kasper Company a net amount of $31,558.55 on account of the income tax paid by that company for the year 1919. Plaintiff argues, as we

all expenses which have been incurred and all losses which have been sustained, and defendants insist that the bonuses paid to other partiesfor the year 1919 were a part of the expenses of the company, and, therefore, the manner of calculating Kasper's bonus for the year 1919, by the board of directors, was in accordance with the contract, and the manner of computing Kasper's bonuses for the years 1915, 1916, 1917 and 1918 was not in accordance with the contract. Defendants further contend that even if the doctrine of interpretation by the parties has any application to the instant case it appears that the directors at the meeting on May 26, 1920, gave a different interpretation to the contract than the one they had given it during the years 1915, 1916, 1917 and 1918. Plaintiff's answer to this argument is that the interpretation placed upon the contract at the meeting of May 26, 1920, was "without the knowledge, approval or consent of Kasper." We are satisfied that the facts do not sustain this position of plaintiff. It is conceded that the amount of the bonus paid Kasper for the year 1919, $63,000, was received by computing Kasper's bonus after the bonuses paid to others had been deducted, and then arbitrarily adding to the amount received the sum of $6171.29 to make a round figure of $63,000. As defendants state, an examination of the "profit and loss and balance sheet" presented at the meeting of the board of directors on May 26, 1920, would have shown just how his bonus was determined. Plaintiff's counsel admits that the even figure, $63,000, might look like "a strange coincidence," but that it was not sufficient to arouse in Kasper a suspicion that his associates were subjecting him to any fraudulent practices. As heretofore stated, the fraud charges were abandoned by plaintiff upon the trial argument. In other reasonable conclusion can be reached from the record than that Kasper, at the meeting of the board of directors held on May 26, 1920, understood the method of computing his bonus and approved the same.

It appears that in the year 1917 the Federal Government refunded to Company a Kasper a net amount of $12,577.77 on account of the income tax paid by that company for the year 1919. Plaintiff argues, as we

understand it, that this refund item should be credited back as a part of the earnings of Durand & Kasper Company in 1919 and that when such credit is made Kasper would be entitled to an additional sum of $3,550.34 on account of his 1919 bonus. We find no merit in this contention. Plaintiff cites no authorities for her statement that "moneys collected after a corporation has ceased to do business necessarily revert back to and are attributable to the year in which the business involving them was done." The net amount of the tax refund was deposited to the account of Trust No. 95. This trust fund was distributed in accordance with the letter of February 8, 1923, addressed to Durand-McNeil-Horner Company and signed by Henry Calvin Durand, Peter J. Kasper, Herbert Delafield and Walter B. Downs. As we have heretofore stated, Kasper was active in the collection of funds that went into the said trust fund and in the ten distributions that were made from the fund, and he received $17,850 as his share of the amounts distributed. Plaintiff seeks to avoid the effect of Kasper's actions in the matter of the trust fund by contending that "it is true that Peter J. Kasper accepted a number of distributions out of Trust 95 but he is not shown to have any appreciable knowledge of the sources from whence came the funds received by him." This argument is completely answered by the facts, which show that he took a very active interest in the trust fund.

It would unduly lengthen this opinion to consider other grounds raised by defendants in support of the instant decree.

The decree in the instant case recites "that the Bill of Complaint in this said cause be, and the same is hereby, dismissed for want of equity," etc. Plaintiff calls attention to the fact that an amended and supplemental bill of complaint, "a complete pleading, in and by itself," was filed in the cause, and she argues that as the amended and supplemental bill of complaint eliminated the bill of complaint from the case, the decree must be reversed because it dismissed only the bill of complaint which was nonexistent at the time of the decree. This contention hardly merits serious consideration. Even

understand it, that this refund item should be credited back as a part of the earnings of Durand & Kasper Company in 1919 and that when such credit is made Kasper would be entitled to an additional sum of $3,590.34 on account of his 1919 bonus. We find no merit in this contention. Plaintiff cites no authorities for her statement that "moneys collected after a corporation has ceased to do business necessarily revert back to and are attributable to the year in which the business involving them was done." The net amount of the tax refund was deposited to the account of Trust No. 95. This trust fund was distributed in accordance with the letter of February 8, 1923, addressed to Durand-McNeil-Horner Company and signed by Henry Calvin Durand, Peter J. Kasper, Herbert Delafield and Walter R. Downs. As we have heretofore stated, Kasper was active in the collection of funds that went into the said trust fund and in the ten distributions that were made from the fund, and he received $17,890 as his share of the amounts distributed. Plaintiff seeks to avoid the effect of Kasper's actions in the matter of the trust fund by contending that "it is true that Peter J. Kasper accepted a number of distributions out of Trust 95 but he is not shown to have any appreciable knowledge of the sources from whence came the funds received by him." This argument is completely answered by the facts, which show that he took a very active interest in the trust fund.

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if there were any merit in it it would avail plaintiff nothing, as the order in that case would be that the cause be reversed and remanded with directions to the trial court to dismiss the amended and supplemental bill of complaint. In Wright v. Risser, 290 Ill. App. 576, the court says (pp. 581, 582): "The author of the article on 'Equity' in 21 C. J. 532, sec. 640, after stating that an amended bill is considered as a continuation of the original bill and with the original bill constitutes but a single bill and one record goes on to say that 'An amendment may, however, be so framed as to become a substitute for all that has gone before and become the only bill before the court. An original bill may be entirely superseded by an amended bill which in effect is a new original bill.' In Bradish v. Grant, 119 Ill. 606, 611, the court said: 'The amendment of a bill does not put two bills into the case. There remains afterward but one bill, the bill as amended. * * * An amended bill is considered as an original bill.' In Joiner v. Fowler, 133 Ill. App. 38, the court said that by filing an amended bill, the complainants abandoned their original bill and transferred their whole cause of action to and merged it in the amended bill. In Benjamin v. Manufacturers' Terminal Co., 246 Ill. App. 590, this court held that when an amended bill is filed by leave of court, there are not two bills then pending but that the amended bill is then considered as the original bill. The only pleading therefore before the chancellor or to be considered by this court is the sufficiency of the third amended complaint, which was filed by leave of court after the chancellor had held the original, first and second amended complainants insufficient."

The decree of the Superior court of Cook county is a just one and it is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

if there were any merit in it it would avail plaintiff nothing, as the order in that case would be that the cause be reversed and remanded with directions to the trial court to dismiss the amended and supplemental bill of complaint. In Leighty v. Tabner, 292 Ill. App. 376, the court says (pp. 381, 382): "The author of the article on 'Equity' in 21 C. J. 212, sec. 44, after stating that an amended bill is considered as a continuation of the original bill and with the original bill constitutes but a single bill and one record goes on in any case 'An amendment may, however, be so framed as to become a substitute for all that has gone before and become the only bill before the court. An original bill may be entirely superseded by an amended bill which is effect is a new original bill.' In Gradley v. Grant, 119 Ill. 364, 367, the court said: 'The amendment of a bill does not put two bills into the case. There remains afterward but one bill, the bill as amended. * * * An amended bill is considered as an original bill.' In Lohner v. Zoller, 111 Ill. App. 32, the court said that by filing an amended bill, the complainants abandoned their original bill and transferred their whole cause of action to and merged it in the amended bill. In Gaylord v. Manufacturers' Insurance Co., 86 Ill. App. 390, this court held that when an amended bill is filed by leave of court, there are not two bills then pending but that the amended bill is then considered as the original bill. The only pleading therefore before the chancellor or to be considered by this court is the sufficiency of the third amended complaint, which was filed by leave of court after the chancellor had held the original, first and second amended complaints insufficient."

The decree of the superior court of Cook county is a just one and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

304 Ill. App.

40730

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. LEONA LESNER, Plaintiff,

v.

GUS VACIANOS, (Defendant) Appellee.

LEONA LESNER, (Complainant) Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 580

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 29, 1938, Leona Lesner, by leave of court, filed a verified "Bastardy Complaint," in which she alleged that on May 23, 1938, she was delivered of a female child in the city of Chicago; that at the time she was so delivered of said child she was and still is an unmarried woman, and that Gus Vacianos, of Chicago, is the father of said child. A warrant issued for the arrest of defendant. He entered a plea of not guilty and waived a jury trial. After evidence heard the trial court found defendant not guilty and entered an order discharging him. The complainant, Leona Lesner, appeals.

It is strenuously argued in this court that the complainant did not receive a fair trial and that the finding of not guilty was not justified under the evidence. After carefully reading the entire record we are satisfied that justice requires that there be a retrial of this cause.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

10. JUDGES SHOULD DIRECTED THE VERDICT OF THE COURT.

On December 29, 1930, Lemon Lumber, by leave of court, filed a verified "Warranty Declaration," in which she alleges that on July 19, 1930, she was delivered of a "Fend" child in the city of Chicago; that at the time she was so delivered of said child she was and still is an unmarried woman, and that the Defendant, at Chicago, is the father of said child. A warrant issued for the arrest of defendant. He entered a plea of not guilty and waived a jury trial. After evidence heard the trial court found defendant not guilty and entered in order discharging him. The complainant, Lemon Lumber, appeals.

It is strenuously argued in this court that the complainant did not receive a fair trial and that the finding of not guilty was not justified under the evidence. Error assigned including the entire record we are satisfied that jurisdiction existed that there be a retrial of this cause.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

McSurely, P. J., and Friedly, J., concur.

41060

VICTORIA BURNHAM et al.,
(Plaintiffs) Appellees,

v.

FRANK R. COTE et al.,
(Defendants) Appellees.

RALPH COTUGNO and N. SALVATORI,
doing business as Midwest Granite & Marble Works,
(Defendants) Appellants.

INTERLOCUTORY
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Ralph Cotugno and N. Salvatori, doing business as Midwest Granite & Marble Works, defendants (hereinafter called appellants), appeal from an order appointing a receiver for certain premises.

On June 3, 1938, plaintiffs filed their verified complaint against a number of defendants, two of whom are appellants. The complaint consisted of two counts, the first praying for the partition of certain real estate in Cook county, Illinois, and the second sought to recover rents from appellants for the use and occupancy of a part of the premises in question. Appellants filed an appearance and also a written demand for a jury trial as to the issues raised by the second count. On June 16, 1938, plaintiffs made a motion before Judge Klarkowski, then sitting in chancery in the Circuit court, asking for the appointment of a receiver for the premises described in the complaint, and in support of the motion offered the verified complaint. The order entered by Judge Klarkowski recites that the court heard the motion, considered the complaint and the arguments of counsel, and denied the motion. From the record it appears that no further steps were taken in the cause until October 6, 1939, when plaintiffs appeared before Judge Rush, then sitting as a chancellor, and moved for the appointment of a receiver upon the allegations contained in the verified complaint.

42000

VICTORIA BOURNEAS et al.,
(Plaintiffs) Appellees,

v.

FRANK B. COOMBS et al.,
(Defendants) Appellees.

RALPH DOTUNNO and E. Salvatore,
doing business as Salvatore Brass-
ite & Marble Works,
(Defendants) Appellants.

APPEAL FROM THE CHANCERY
COURT OF COOK COUNTY.

MR. JUSTICE SCHALY DELIVERED THE OPINION OF THE COURT.

Ralph Dotunno and E. Salvatore, doing business as Salvatore Granite & Marble Works, defendants (hereinafter called appellants), appeal from an order appointing a receiver for certain premises.

On June 3, 1938, plaintiffs filed their verified complaint against a number of defendants, two of whom are appellants. The complaint consisted of two counts, the first praying for the partition of certain real estate in Cook county, Illinois, and the second sought to recover rents from appellants for the use and occupancy of a part of the premises in question. Appellants filed an appearance and also a written demand for a jury trial as to the issues raised by the second count. On June 16, 1938, plaintiffs made a motion before Judge Klarkowski, then sitting in chancery in the circuit court, asking for the appointment of a receiver for the premises described in the complaint, and in support of the motion offered the verified complaint. The order entered by Judge Klarkowski recites that the court heard the motion, considered the complaint and the arguments of counsel, and denied the motion. From the record it appears that no further steps were taken in the cause until October 6, 1938, when plaintiffs appeared before Judge Lusk, then sitting as a chancellor, and moved for the appointment of a receiver upon the allegations contained in the verified complaint.

The verified complaint had not been amended since the application for a receiver had been made before Judge Klarkowski and no petition or evidence was presented to Judge Rush showing any new facts or circumstances, or changed conditions. Appellants objected to the appointment of a receiver and called the attention of Judge Rush to the order entered by Judge Klarkowski on June 16, 1938; nevertheless, Judge Rush entered the order appointing a receiver.

Appellants contend that under the record Judge Rush committed reversible error in entering the order appointing the receiver.

The law governing the instant appeal is plain. In Kelly v. Marks, 267 Ill. App. 199, complainant moved for the appointment of a receiver before Judge Trude. Judge Trude entered an order denying the motion "at this time." Thereupon complainant filed certain amendments to the original bill and the bill as amended was verified. Thereupon complainant made a second motion for the appointment of a receiver, before Judge Finnegan, upon the bill as amended. At the hearing upon the motion complainant introduced certain oral and documentary evidence in support of the motion and defendants made no attempt, by oral testimony or affidavits, to dispute the allegations of complainant's sworn bill as amended, or to sustain any of the allegations of their unsworn answer. The trial court thereupon appointed a receiver and the defendant appealed. In our opinion we stated (pp. 207, 208): "It is to be noticed that counsel for defendants do not contend that the facts as alleged in complainant's sworn bill as amended, supplemented by complainant's evidence introduced at the hearing of February 5, 1932, were not sufficient to warrant the appointment of a receiver, but their contentions, here urged as grounds for a reversal of the order in question, are in substance (1) that the entry of the order of August 10, 1931, denying the motion for the receiver based on the original bill, is such an adjudication as bars the granting of the new motion for a receiver, though based upon the allegations of the bill as amended and supplemented by said evidence, and (2) that the court erred in

The verified complaint had not been amended since the application for a receiver had been made before Judge Klarkowski and no petition or evidence was presented to Judge Rush showing any new facts or circumstances, or changed conditions. Appellants objected to the appointment of a receiver and called the attention of Judge Rush to the order entered by Judge Klarkowski on June 14, 1932; nevertheless, Judge Rush entered the order appointing a receiver.

Appellants contend that under the record Judge Rush committed reversible error in entering the order appointing the receiver.

The law governing the instant appeal is plain. In Kelly v. Kelly, 267 Ill. App. 199, complainant moved for the appointment of a receiver before Judge Trude. Judge Trude entered an order denying the motion "at this time." Thereupon complainant filed certain amendments to the original bill and the bill as amended was verified. Thereupon complainant made a second motion for the appointment of a receiver, before Judge Finnegan, upon the bill as amended. At the hearing upon the motion complainant introduced certain oral and documentary evidence in support of the motion and defendants made no attempt, by oral testimony or affidavits, to dispute the allegations of complainant's sworn bill as amended, or to sustain any of the allegations of their sworn answer. The trial court thereupon appointed a receiver and the defendant appealed. In our opinion we stated (pp. 207, 208): "It is to be noticed that counsel for defendants do not contend that the facts as alleged in complainant's sworn bill as amended, supplemented by complainant's evidence introduced at the hearing of February 5, 1932, were not sufficient to warrant the appointment of a receiver, but their contentions were urged as grounds for a reversal of the order in question, are in substance (1) that the entry of the order of August 10, 1931, denying the motion for the receiver based on the original bill, is such an adjudication as bars the granting of the new motion for a receiver, though based upon the allegations of the bill as amended and supplemented by said evidence, and (2) that the court erred in

not allowing defendants to give complainant the bond as tendered in lieu of appointing a receiver, as provided by statute. As to counsels' first contention, we think it wholly lacking in merit. It clearly appears that on the first application the court, in refusing to appoint a receiver, was impressed by the allegation of defendants' counsel that the premises had a value of $40,000. On the second application, based upon the bill as amended and complainant's evidence, new facts were presented to the court and it appeared without contradiction that the value of the premises was 'not in excess of $25,000,' or less than complainant's indebtedness secured by said first mortgage. Furthermore, the order of August 10, 1931, was an interlocutory one (3 Corpus Juris, sec. 412, p. 575) and one that could before final decree be modified or changed as new facts warranted. In Riggs v. Pursell, 74 N. Y. 370, 378, 379, it is said: 'We do not understand the rules applicable to judgments as estoppels to be applicable to their full extent to orders made on motions. * * * Where additional facts are presented or defects in proof supplied, it is quite usual to grant leave to renew a motion which has been denied or to rehear one which has been granted.' In Sill v. Kentucky Coal & Timber Development Co., 11 Del. Ch. 93, 97 Atl. 617, 619, it is said: 'The suit is for a receiver based on insolvency, by appealing to a discretionary power given to the court, and it does not necessarily follow that the prior refusal of another court to appoint the receiver, based on certain allegations and a certain state of facts, would preclude this court under other facts from granting the relief.'" (Italics ours.) Other authorities to the same effect might be cited if it were necessary.

In the instant case, Judge Rush, in effect, reviewed the judgment of Judge Klarkowski and reversed it. If such a practice were allowed and followed it would produce an intolerable situation.

The interlocutory order of the Circuit court of Cook county dated October 6, 1939, is reversed.

INTERLOCUTORY ORDER DATED
OCTOBER 6, 1939, REVERSED.

Sullivan, P. J., and Friend, J., concur.

not allowing defendants to give complainant the bond as tendered in lieu of appointing a receiver, as provided by statute. As to counsel's first contention, we think it wholly lacking in merit. It clearly appears that on the first application the court, in refusing to appoint a receiver, was impressed by the allegation of defendants' counsel that the premises had a value of $40,000. On the second application, based upon the bill as amended and complainant's evidence, new facts were presented to the court and it appeared without contradiction that the value of the premises was 'not in excess of $25,000,' or less than complainant's indebtedness secured by said first mortgage. Furthermore, the order of August 10, 1931, was an interlocutory one (3 Corpus Juris, sec. 414, p. 371) and one that could before final decree be modified or changed as new facts warranted. In Ogden v. Gerrish, 94 N. Y. 274, 279, 279, it is said: 'We do not understand the rules applicable to injunctions as stopping to be applicable in their full extent to orders made on motions. * * * Where additional facts are presented or further proof supplied, it is quite usual to grant leave to renew a motion which has been denied or to reheer one which has been granted.' In Bill v. Kentucky Coal & Timber Development Co., 11 Del. Ch. 93, 97 Atl. 617, 619, it is said: 'The suit is for a receiver based on insolvency, by appealing to a discretionary power given to the court, and it does not necessarily follow that the prior refusal of another court to appoint the receiver, based on certain allegations and a certain state of facts, would preclude this court under other facts from granting the relief.' (Italics ours.) Other authorities to the same effect might be cited if it were necessary.

In the instant case, Judge Hugh, in effect, reviewed the judgment of Judge Klaxowski and reversed it. If such practice were allowed and followed it would produce an intolerable situation.

The interlocutory order of the Circuit court of Cook county dated October 6, 1931, is reversed.

INTERLOCUTORY ORDER DATED
OCTOBER 6, 1931, REVERSED.

Sullivan, P. J., and Friend, J., concur.

304 ILL. App.

40805

MICHAEL TAHENY,
Appellee,

v.

THE CATHOLIC BISHOP OF CHICAGO,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

304 I.A. 581

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of $1200 entered on the finding of the court. The suit was for balance claimed for services of plaintiff in the construction of the St. Bartholomew Church building.

Plaintiff was employed by the pastor of the church, Rev. Joseph Morrison, about September 5, 1936, to observe the construction and to report any irregularities. He received the plans and specifications September 5, 1936. The building was under construction for about thirteen months. Defendant paid plaintiff $1300 and claims no more is due. Plaintiff contends there was an oral agreement he was to be paid 2% of the cost of construction of the building. The evidence shows this cost was more than $135,000. Computed on this basis the amount earned by plaintiff would be $2700.

Plaintiff was not a licensed architect. Defendant contends the services rendered by him constituted the practice of architecture; that the contract was therefore illegal and that plaintiff cannot recover on it. Defendant cites Section 2, Chapter 10-1/2, Ill. Rev. Stats. 1939, and Keenan v. Thuma, 240 Ill. App. 448. There is no merit in the contention. The plans for the building were prepared by Gerald Barry a licensed architect. Barry, under a written contract, was also employed to superintend the construction. The employment of plaintiff was special in its nature and neither the statute nor the Keenan case are applicable.

Defendant further contends that Father Morrison was without authority to employ plaintiff (a point argued at length with numerous

4009

RICHARD TURNER,

Appellee,

v.

THE CATHOLIC DIOCESE OF SPOKANE,

Appellant.

No. PRESIDING JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of $1800 entered on the finding of the court. The suit was for balance claimed for services of plaintiff in the construction of the St. Bartholomew Church building.

Plaintiff was employed by the pastor of the church, Rev. Joseph Morrison, about September 5, 1926, to observe the construction and to report any irregularities. He received the plans and specifications September 5, 1926. The building was under construction for about fifteen months. Defendant paid plaintiff $1800 and claims no more is due. Plaintiff contends there was an oral agreement he was to be paid 5% of the cost of construction of the building. The evidence shows this cost was more than $156,000. Computed on this basis the amount earned by plaintiff would be $7800.

Plaintiff was not a licensed architect. Defendant contends the services rendered by him constituted the practice of architecture; that the contract was therefore illegal and that plaintiff cannot recover on it. Defendant cites Section 7, Chapter 15-1/2, 1921 Ter. Stat. 1923, and Keenan v. Thomas, 260 Ill. App. 448. There is no merit in the contention. The plans for the building were prepared by certain Perry a licensed architect. Perry, under a written contract, was also employed to superintend the construction. The employment of plaintiff was special in the manner and neither the statute nor the Keenan case are applicable.

Defendant further contends that Father Morrison was without authority to employ plaintiff (a point argued at length with numerous

citations of authority). This contention also is without merit. The statement of claim alleged the employment. The affidavit of merits did not deny this. It did not raise the defense that Father Morrison was without authority and the evidence shows he had complete charge.

The controlling question in the case is of fact, namely, whether Father Morrison in behalf of the church agreed to pay plaintiff 2% of the cost of construction. The burden of proof was upon plaintiff to show this by a preponderance of the evidence. Plaintiff's evidence of the alleged agreement to pay 2% consists of supposed oral statements made by Father Morrison, who is deceased. Plaintiff testified to the terms of his employment. A motion was made to strike his evidence on the ground that he was incompetent since Morrison was dead. The motion was denied. The evidence shows plaintiff was a mason contractor of experience in construction work. He had received an injury which very much affected his capacity for service. Dr. Phelan, who was physician for plaintiff and also for Father Morrison, called as a witness by plaintiff, testified he was surprised seeing plaintiff on the job in view of his physical condition. Harry, the architect, had been hired to prepare the plans and specifications. For this service he was to receive 3% of the cost of construction. He was also employed to superintend and, in fact, performed the usual services of a superintendent and was paid therefor 2% of the cost of construction. Plaintiff performed services for defendant at the request of Father Morrison but there is no proof of what would have been reasonable compensation for these services.

Plaintiff relied on an express contract and offered no evidence on the theory of quantum meruit. The only evidence of plaintiff on the issue of fact is of alleged oral statements of Father Morrison. Father Morrison died June 28, 1938. Our Supreme court has said: " * * * evidence of admissions made by persons since dead should be carefully scrutinized and considered with all the evidence of the case, as it is likely to be abused." (Megginson v. Megginson, 367 Ill. 168, 180; Delee v. Leahy, 278 Ill. App. 178.)

citations of authority). This contention also is without merit. The statement of claim alleged the employment. The affidavit of merits did not deny this. It did not raise the defense that Father Morrison was without authority and the evidence shows he had complete charge.

The controlling question in the case is of fact, namely, whether Father Morrison in behalf of the church agreed to pay plaintiff 2% of the cost of construction. The burden of proof was upon plaintiff to show this by a preponderance of the evidence. Plaintiff's evidence of the alleged agreement to pay 2% consists of supposed oral statements made by Father Morrison, who is deceased. Plaintiff testified to the terms of his employment. A motion was made to strike his evidence on the ground that he was incompetent since Morrison was dead. The motion was denied. The evidence shows plaintiff was a mason contractor of experience in construction work. He had received an injury which very much affected his capacity for service. Dr. Phelan, who was physician for plaintiff and also for Father Morrison, called as a witness by plaintiff, testified he was surprised seeing plaintiff on the job in view of his physical condition. Henry, the architect, had been hired to prepare the plans and specifications. For this service he was to receive 3% of the cost of construction. He was also employed to superintend and, in fact, performed the usual services of a superintendent and was paid therefor 3% of the cost of construction. Plaintiff performed services for defendant at the request of Father Morrison but there is no proof of what would have been reasonable compensation for those services.

Plaintiff relied on an express contract and offered no evidence on the theory of quantum meruit. The only evidence of plaintiff on the issue of fact is of alleged oral statements of Father Morrison. Father Morrison died June 26, 1928. Our supreme court has said:

" * * * evidence of admissions made by persons since dead should be carefully scrutinized and considered with all the evidence of the case, as it is likely to be biased." (Mechanics v. Teggleman, 247 Ill. 180, 180; Paige v. Leahy, 272 Ill. App. 174.)

We have given careful consideration to the evidence of plaintiff and his witnesses. Plaintiff testified Father Morrison asked him if he could "superintend" the building of the church for him; that plaintiff said "yes", and that Father Morrison said, "I will pay you 2% as I paid you on the convent"; to which plaintiff said, "All right." Plaintiff did not prove how much the convent cost nor how much he was paid for his services on it. Plaintiff further testified that several times in January and February, 1938, he went to see Father Morrison who was too ill to see anybody. He then went back in March when he saw Father Byron, the assistant pastor. He testifies that Byron told him that when Father Morrison, who was ill, should be taken away, he (Byron) would have a right to sign checks and would write him one for $1200. He also says that Father Byron told him he could not pay him because he (plaintiff) did not have a written contract.

Byron denies having made any such statements. He says he told Morrison about plaintiff's claim and that Morrison laughed at it and said he had never made any such agreement with plaintiff, which he (Byron) reported to plaintiff. Whereupon, plaintiff became much excited and said he had six or seven people who would testify that he was to be paid 2% of the contract price. Father Byron also says that Morrison told him and he told plaintiff that Morrison said if it had not been for him (Morrison) plaintiff would not have anything; that his last job was on the convent in 1930, and that the giving of the job to plaintiff was purely an act of charity; that his employment was because of the pleas of a number of the members of the Holy Name Society of the church; that he at no time promised plaintiff 2%.

Plaintiff in rebuttal denied the conversations related by Byron. His testimony is upon the whole improbable and in view of his financial interest we think ought not to be accepted as true. Evidence as to whether plaintiff had any other employment after his work on the convent was excluded upon plaintiff's objection, we think erroneously. In view of the objection we think it is fair to assume he did not have any such employment. Plaintiff's daughter took the

We have given careful consideration to the evidence of plaintiff and his witnesses. Plaintiff testified Father Morrison asked him if he could "superintend" the building of the church for him; that plaintiff said "yes", and that Father Morrison said, "I will pay you as I said you on the contract"; to which plaintiff said, "All right." Plaintiff did not prove how much the convent cost nor how much he was paid for his services on it. Plaintiff further testified that several times in January and February, 1928, he went to see Father Morrison who was too ill to see anybody. He then went back in March when he saw Father Byron, the assistant pastor. He testifies that Byron told him that when Father Morrison, who was ill, should be taken away, he (Byron) would have a right to sign checks and would write him one for $1200. He also says that Father Byron told him he could not pay him because he (plaintiff) did not have a written contract.

Byron denies having made any such statements. He says he told Morrison about plaintiff's claim and that Morrison laughed at it and said he had never made any such agreement with plaintiff, which he (Byron) reported to plaintiff. Thereupon, plaintiff became much excited and said he had six or seven people who would testify that he was to be paid 5% of the contract price. Father Byron also says that Morrison told him and he told plaintiff that Morrison said if it had not been for him (Morrison) plaintiff would not have anything; that his last job was on the convent in 1920, and that the giving of the job to plaintiff was purely an act of charity; that his employment was because of the plans of a number of the members of the Holy Name Society of the church; that he at no time promised plaintiff 5%.

Plaintiff in rebuttal denied the conversations related by Byron. His testimony is upon the whole improbable and in view of his financial interest we think ought not to be accepted as true. Evidence as to whether plaintiff had any other employment after his work on the convent was excluded upon plaintiff's objection, by this court erroneously. In view of the conclusion we shall reach it is fair to assume he did not have any such employment. Plaintiff's daughter took the

stand to corroborate his testimony as to the construction of the convent but her evidence on this point turned out to be hearsay and was stricken by the court.

Three friends testified to alleged admissions of Father Morrison at a meeting of the Holy Name Society of the church held in October, 1937. One says that Morrison said he had employed plaintiff at the same rate of pay he paid him when he supervised the construction of the convent, "which was 2% of the price of the contract." Another testified Father Morrison said, "Michael Taheny is going to supervise the new church, with the same salary he received when he supervised the sisters' convent." This witness also says that about two weeks afterward Father Morrison said that Mike was taking care of everything; "he is getting 2% of what the cost of the building is." Another says that Father Morrison in substance said that plaintiff was to superintend the construction of the new church under the same conditions and same contract as he did when he hired him for the building of the convent. As already stated there is no evidence as to the cost of the convent, the time plaintiff worked on it or the actual compensation he received for his work on it.

Father Morrison's books were produced and indicated plaintiff had been paid in full. It seems extremely improbable that the pastor of the church would hire two men to perform the same service and pay to them exactly the same compensation. The testimony of plaintiff in rebuttal denying conversations with Father Byron is improbable and goes far to discredit his entire testimony. The evidence of Dr. Phelan, plaintiff's witness, indicates plaintiff had been paid for service on the convent $1300, and that Father Morrison understood he was to receive the same amount for his work on the church building. Courts are slow to accept testimony of conversations with those since dead from persons financially interested.

Plaintiff's case rests entirely on that kind of testimony. Considered with all the other evidence this testimony is extremely

stand to corroborate his testimony as to the construction of the convent but her evidence on this point turned out to be hearsay and was stricken by the court.

Three friends testified to alleged admissions of Father Morrison at a meeting of the Holy Name Society of the church held in October, 1937. One says that Morrison said he had employed plaintiff at the same rate of pay he paid him when he supervised the construction of the convent, "which was 75% of the price of the contract." Another testified Father Morrison said, "Michael Tobey is going to supervise the new church, with the same salary he received when he supervised the sisters' convent." Three witnesses also say that about two weeks afterward Father Morrison said that Mike was taking care of everything; "he is getting 75% of what the cost of the building is." Another says that Father Morrison in substance said that plaintiff was to superintend the construction of the new church under the same conditions and same contract as he did when he hired him for the building of the convent. As already stated there is no evidence as to the cost of the convent, the time plaintiff worked on it or the actual compensation he received for his work on it.

Father Morrison's books were produced and indicated plaintiff had been paid in full. It seems extremely improbable that the pastor of the church would hire the man to perform the same services and pay to them exactly the same compensation. The testimony of plaintiff in rebutted damaging conversations with Father Myron is improbable and goes far to discredit his entire testimony. The evidence of Dr. Phelan, plaintiff's witness, indicates plaintiff had been paid for service on the convent 1937, and that Father Morrison understood he was to receive the same amount for his work on the church building. Courts are slow to accept testimony of conversations with these minor and free persons financially interested.

Plaintiff's case rests entirely on that kind of testimony. Considered with all the other evidence this testimony is extremely

improbable. Plaintiff introduced no evidence as to the reasonable worth of his services. If plaintiff's services were actually worth more than he received, ample evidence was available. None was produced. The absence of such evidence is significant. It was for plaintiff to prove his case by a preponderance of the evidence. The finding of the court is manifestly against the evidence. The judgment will be reversed.

JUDGMENT REVERSED.

O'Connor and McSurely, JJ., concur.

impeachment. Plaintiff introduced no evidence as to the reasonable worth of his services. If plaintiff's services were actually worth more than he received, ample evidence was available. Some was produced. The absence of such evidence is significant. It was for plaintiff to prove his case by a preponderance of the evidence. The finding of the court is manifestly against the evidence. The judgment will be reversed.

TERMINAL REFERENCE.

O'Connor and McNaughton, JJ., concur.

304 ILL. APP.

40931

JOSEPHINE CARDEMONE and THERESA ALFIERI,
Plaintiffs,

DOMINIC GUILIANO,
(Intervening Plaintiff)
Appellee,

v.

SUPREME FOREST WOODMAN CIRCLE, a corporation, WOMEN'S CATHOLIC ORDER OF FORESTERS, a corporation, and ROSA LOMBARDI,
Defendants.

MARIE MEYERS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

304 I.A. 582

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant, Marie Meyers, appeals from a decree entered March 10, 1939, which found that she had made an equitable assignment to the intervening petitioner, Dominic Guiliano, of her interest in two fraternal insurance policies in which she was named as beneficiary. Guiliano claimed the assignment had been made to him to secure the payment of an indebtedness of Marie Meyers to him, the several items of which amounted to the total sum of $615.00. There were other claimants to the funds due under the insurance policies, and the insurance companies by order of court paid the whole amount due to the clerk of the court. The decree directed that $615.00 of the funds deposited with the clerk should be paid to Guiliano and $361.50, balance, to Marie Meyers, and she appeals.

She contends that the evidence would not justify a finding that there was either a written or oral assignment of the proceeds of the policies in question. Guiliano called the defendant as a witness. She testified in substance that she had known him since the latter part of 1933, and identified a note for the sum of $80.00 which she executed to his order on June 11, 1936. The note contains power to confess judgment. She also testified that she received other money from plaintiff, which was used to pay hospital

[illegible]

[illegible]

[illegible]

bills of her mother. Her mother came home from the hospital on May 31, 1937, and died on November 21, 1937. She does not deny that she received the total amount of $615.00 from Guiliano, and she says he gave her money at times when she did not ask for it. She testified that their relations were very close, and in fact, in substance that she had been his mistress until there was an estrangement.

Guiliano testified that he was in the plumbing business; that he knew Mrs. Meyers for three or four years before May, 1937; that he loaned her the $80.00 on a note in June, 1936; that he saw her in May, 1937, at his store and told her he could not give her any more money, saying, "You owe me $80.00 now." He says she replied that her mother was very sick; that she needed the money and could not get it any other place. He said, "I am not going to give you any more money, you owe me money now, and you don't pay me." "Well," she said, "I got both insurance policies on my mother and she made me beneficiary on both insurance and I can pay you from that. I pay you from that." He further says that he saw the mother of defendant, Mrs. Piccolo, after she came out of the hospital and at her home; that Mrs. Meyers showed him the insurance policies and said she was the beneficiary. On the day after Mrs. Piccolo died, plaintiff gave to Mrs. Meyers a check for $40.00. He says she was at his place and said her mother died and that she had to have a little money. He asked her how much and she said about $40.00. He gave it to her and said, "Wait a minute. Let's see how much you owe me now; and so we figured it up and it was $615.00. Well, I says, 'When are you going to give me this money,' and I had some paper I wanted her to sign and she says, 'No use signing any paper; my word is just as good. I am going to transfer to you $615.00 out of the insurance money. As soon as I receive the insurance I will pay you. I will turn over that amount to you.' She said she is going to assign that to me, the $615.00 from the insurance money from her mother. I did not see her after the funeral."

On cross-examination plaintiff said that he carried forms of

bills of her mother. Her mother came home from the hospital on May 22, 1957, and died on Thursday 23, 1957. She knew not only that she received the total amount of $815.00 from Williams, and she says he gave her money at times when she did not ask for it. She testified that their relations were very close, and in fact, he authorized that she had been his mistress until there was an estrangement.

Williams testified that he was in the plumbing business; that he knew Mrs. Meyers for three or four years before May, 1957; that he loaned her the $30.00 on a note in June, 1956; that he saw her in May, 1957, at his store and told her he would not give her any more money, saying, "You owe me $30.00 now." He says she replied that her mother was very sick; that she needed the money and could not get it any other place. He said, "I am not going to give you any more money, you owe me money now, and you don't pay me." "Well," she said, "I got both insurance policies on my mother and she made me beneficiary on both insurance and I can pay you from that. I pay you from that." He further says that he saw the mother of defendant, Mrs. Picoola, after she came out of the hospital and at her home; that Mrs. Meyers showed him the insurance policies and said she was the beneficiary. On the day after Mrs. Picoola died, plaintiff gave to Mrs. Meyers a check for $40.00. He says she was at his place and said her mother died and that she had to have a little money. He asked her how much and she said about $40.00. He gave it to her and said, "Wait a minute. Let's see how much you owe me now; and so he figured it up and it was $818.00. Well, I says, 'When are you going to give me this money,' and I had some paper I wanted her to sign and she says, 'No use signing any paper; my word is just as good. I am going to transfer to you $818.00 out of the insurance money. As soon as I receive the insurance I will pay you. I will turn over that amount to you.' She said she is going to assign that to me, the $818.00 from the insurance money from her mother. I did not see her after the funeral."

On cross-examination plaintiff said that he charged forms of

notes in his office; that when he gave Mrs. Meyers other checks he didn't have her sign notes for them because she did not know how much she wanted; that she said, "Whatever there is at the end after I get this insurance, I will pay you, she says." Guiliano says that the first time he gave her money he got the note from her, and that he didn't take notes from her after that because she didn't want to sign a note. She said her word was good and the check was a receipt, and she would figure how much she owed and have the insurance pay it. He says every time he gave her a check he told her, "I remember what you get;" that he saw both policies a month before the mother died; that he asked her to show them, but she said, "You don't have to worry, the insurance people pay you." He says at the time she got the last $40.00 she told him she would "assign". He did not see the policies at that time, and he did not see the policies after Mrs. Piccolo's death.

Mrs. Meyers testifying in her own behalf said that she got much more money from Mr. Guiliano in the four years last past than all the checks combined, maybe three or four times that; that she didn't know how much she borrowed; that she did not receive the last $40.00 from Guiliano personally but through the mail; that Mr. Weber had the envelope in his files. The court inquired what the occasion was for his generosity, to which she replied, "If you want me to tell you the truth, I had been going with him, practically living with him, if you want to put it that way. I have been seeing him since 1934. I would have been going with him yet if he had not been so inconsistent, wanting to go out with me. I wanted to be left alone after my mother died and let time heal things and he was just right after me and I had a set-to one morning with him and I got on a train and went away and nobody knew where I was." She also testified that he at one time told her he was going to destroy the $80.00 note. She testified that the policies were not turned over to her until the latter part of August. None of these statements of Mrs. Meyers are denied by Guiliano.

when in his office; that when he gave her, perhaps once a week he didn't have her sign notes for them because she did not know how much she wanted; that she said, "Whatever there is at the end after I pay this insurance, I will pay you, she says." Guillano says that the first time he gave her money he got the note from her, and that he didn't take notes from her after that because she didn't want to sign a note. She said her word was good and the check was a receipt, and she would figure how much she owed and have the insurance pay it. He says every time he gave her a check he told her, "I remember what you get;" that he saw both policies a month before the mother died; that he asked her to show them, but she said, "You don't have to worry, the insurance people pay you." He says at the time she got the last $20.00 she told him she would "assign". He did not see the policies at that time, and he did not see the policies after Pisoole's death.

Mrs. Meyers testifying in her own behalf said that she got much more money from Mr. Guillano in the four years last past than all the checks combined, maybe three or four times that; that she didn't know how much she borrowed; that she did not receive the last $20.00 from Guillano personally but through the mail; that Mr. Meyer had the envelope in his files. The court inquired what the occasion was for his generosity, to which she replied, "If you want me to tell you the truth, I had been going with him, practically living with him, if you want to put it that way. I have been seeing him since 1924. I would have been going with him yet if he had not been so inconsiderate, wanting to go out with me. I wanted to be late since after my mother died and let them and things and be the just right after me and I had a set-to one morning with him and I put on a train and went away and nobody knew where I was." She also testified that he at one time told her he was going to destroy the $20.00 note. She testified that the policies were not turned over to her until the latter part of August. None of these statements of Mrs. Meyers are denied by Guillano.

It must, we think, be held this evidence falls short of constituting an equitable assignment of this fund. It at most amounts to no more than a general agreement to pay her debt, if, in fact, there was a debt, out of a designated fund. This does not constitute an equitable assignment. In Wyman v. Snyder, 112 Ill. 99, 1 N.E. 469, the Supreme court said:

> "The burden of proof is, of course, upon the appellant to show, by satisfactory evidence, that there was an actual assignment to him of one-half of the debt or claim against Bruce, Rene & Little, as contradistinguished from a mere promise or undertaking on Benson's part to pay appellant one-half of such debt or claim when collected."

The cases all hold that a mere promise or agreement to pay without a present appropriation or transfer will not operate as an equitable assignment of a fund, and that a mere agreement to pay generally out of a designated fund will not operate as an equitable assignment of the fund. Of the many cases which might be cited, these are sufficient: Wyman v. Snyder, 112 Ill. 99, 1 N.E. 469; Story v. Hull, 143 Ill. 506-511, 32 N.E. 265; Trist v. Child, 21 Wall. 441; Hibernian Banking Ass'n v. Davis, 295 Ill. 537-545, 129 N.E. 540; Newell v. Grant Locomotive Works, 50 Ill. App. 611; Reynolds v. First National Bank of Chicago, on Appeal of Labovitz, 279 Ill. App. 581-595. It follows that the judgment must be reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

It must, we think, be held this evidence falls short of constituting an equitable assignment of this fund. It at most amounts to no more than a general agreement to pay her debt, if, in fact, there was a debt, but of a designated fund. This does not constitute an equitable assignment. In Kamm v. Jordan, 112 Ill. 99, 1 N.E. 489, the Supreme Court said:

"The burden of proof is, of course, upon the appellees to show, by satisfactory evidence, that there was an actual assignment to him of one-half of the debt or claim against Irwin. Now a little, as mentioned in Jones's work, from a mere promise or solicitation on Jones's part to pay appellees one-half of such debt or claim when collected."

The cases all hold that a mere promise or agreement to pay without a present appropriation or transfer will not operate as an equitable assignment of a fund, and that a mere agreement to pay generally out of a designated fund will not operate as an equitable assignment of the fund. Of the many cases which might be cited, these are sufficient: Kamm v. Jordan, 112 Ill. 99, 1 N.E. 489; Storey v. Hull, 142 Ill. 306-311, 32 N.E. 555; Yates v. Child, 21 Vail. 441; Fidelity Building Ass'n v. Davis, 206 Ill. 479-484, 69 N.E. 540; Bassil v. Great Lakeworthy works, 80 Ill. App. 611; Lagrelle v. First National Bank of Cairo, 26 Appeal of Lawyers, 270 Ill. App. 480-482. It follows that the judgment must be reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cameron and Kunsely, JJ., concur.

40994

304 Ill. App.

CHICAGO ART MARBLE CO., a corporation,
Appellee,

v.

A. SMITH & CO., a corporation,
Appellant.

) APPEAL FROM
) CIRCUIT COURT
) COOK COUNTY.

162 CR

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to foreclose a mechanic's lien plaintiff (a sub-contractor) made a motion for summary judgment against the defendant contractor, which was allowed in the sum of $1,237.50, the balance admitted to be due. Plaintiff claimed further, however, for extras to the amount of $356.67, and also damages in the sum of $150.00 for alleged conversion of property by defendant. The claims were referred to a master. No evidence was offered of the alleged conversion, but evidence was taken on the claim for extras. The master reported in favor of plaintiff for the full amount claimed for extras with interest of $35.65 and damages of $23.27 allowed for alleged vexatious delay in payment, making a total sum of $415.61. Objections were filed. The report was amended and objections overruled. The cause was heard on exceptions to the master's report, and June 30, 1939, the chancellor overruled the exceptions and entered a decree for $415.61, with costs.

Defendant, appealing, contends the decree is against the weight of the evidence; that the alleged oral agreement relied upon as to payment for extras was void for want of consideration; and that the fees and charges of the master and stenographer as allowed are excessive.

March 16, 1936, plaintiff entered into a sub-contract with defendant, who had a contract for the construction of the Diagnostic Building of the Elgin State Hospital. The sub-contract provided for the installation of an art marble base pursuant to plans and specifications. Paragraph 8034 of the specifications provides: "Upon completion of all flooring and after the building has been left entirely

In an action by Plaintiff a municipality's Plaintiff is sub-contractor; such a action for monetary judgment against the defendant contractor, which was filed in the amount of $1,217.87, the matter admitted to be due. Plaintiff claimed further, however, the return in the amount of $282.87, and also damages in the sum of $187.00 for alleged conversion of property by defendant. The claims were referred to a master. No evidence was offered of the alleged conversion, but evidence was taken on the claim for rebate. The master recommended in favor of plaintiff for the full amount claimed for return with interest of $82.00 and damages of $23.87 allowed for alleged vexatious delay in payment, making a total sum of $1,123.61. Objections were filed. The report was amended and exceptions overruled. The court has based an conclusions to the master's report, and June 20, 1922, the chancellor overruled the exceptions and entered a decree for $1,123.61, with costs.

Defendant, appealing, contends the decree is against the weight of the evidence; that the alleged oral agreement relied upon as to payment for rebate was void the-want of consideration; and that the fees and charges of the master and stenographer be allowed are excessive.

March 18, 1920, plaintiff entered into a sub-contract with defendant, who had a contract for the construction of the Stenographic Building of the Elgin State Hospital. The sub-contract provided for the installation of an art marble base pursuant to plans and specifications. Paragraph 8024 of the specifications provides: "Upon completion of all flooring and after the building has been left entirely

clean and the art marble base shall be given two coats of an approved type finish treatment which shall be well rubbed in. Care should be taken not to stain plaster above base." Paragraphs 8007, 8008 and 8009 provide: "8007. After all work is completed, all terrazzo and art marble surfaces shall be thoroughly cleaned to remove all stains and surplus cement, all surfaces shall be left clean and in perfect condition. 8008. Upon completion of the various portions of his work, the terrazzo and art marble contractor shall remove all unused materials, rubbish, etc., in connection with this contract. 8009. All preparatory work required for the proper execution of the terrazzo and art marble work as hereinafter described shall be done and performed by this contractor, except as otherwise specified."

The contract for the terrazzo work was sublet by defendant to another sub-contractor. Plaintiff commenced work under his sub-contract in October, 1936. The art marble base consisted of slabs from 6 inches to 6 feet in length set up horizontally on their edges at the base of the walls, protruding about 1/16 to 1/8 of an inch, which means that the surfaces of the slabs of marble at the joints were not flush. In the trade these were known as "lips," and in order to properly complete the sub-contract it was necessary for the contractor to hone down these joints or "lips" so as to make a smooth surface.

defendant

The testimony for plaintiff also tended to show that the marble base had not been set in a proper manner by other sub-contractors; that the face of the base was not in line and the top of it was not level; that protective material left with other contractors by plaintiff had not been used by them while doing their work; that in laying the concrete floors in the halls these other sub-contractors splashed up the material which had been placed there by plaintiff and their workmen with trowels and other tools used in leveling the surface caused numerous nicks to be made in the material furnished by plaintiff; that the workmen for the terrazzo contractor splashed up the cones of the base, then papered it over and failed to remove the

plaintiff

① Evidence for plaintiff tended to show

clean and the art marble base shall be given two coats of an approved type floor treatment which shall be well rubbed in. Care should be taken not to stain plaster above base." Paragraphs 6007, 6008 and 6009 provide: "6007. After all work is completed, all terrazzo and art marble surfaces shall be thoroughly cleaned to remove all stains and surplus cement, all surfaces shall be left clean and in perfect condition. 6008. Upon completion of the various portions of his work, the terrazzo and art marble contractor shall remove all unused materials, rubbish, etc., in connection with this contract. 6009. All preparatory work required for the proper execution of the terrazzo and art marble work as hereinafter described shall be done and performed by this contractor, except as otherwise specified."

The contract for the terrazzo work was sublet by defendant to another sub-contractor. Plaintiff commenced work under his sub-contract in October, 1926. The art marble base consisted of slabs from 6 inches to 6 feet in length set up horizontally on their edges at the base of the walls, projecting about 1/16 to 1/8 of an inch, which means that the surfaces of the slabs of marble at the joints were not flush. In the trade these were known as "lips," and in order to properly complete the sub-contract it was necessary for the contractor to hone down these joints or "lips" so as to make a smooth surface.

The testimony for plaintiff also tended to show that the marble base had not been set in a proper manner by other sub-contractors; that the tops of the base were not in line and the top of it was not level; that protective material left with other contractors by plaintiff had not been used by them while doing their work; that in laying the concrete floors in the halls these other sub-contractors splashed up the material which had been placed there by plaintiff and their workmen wipe their towels and other tools used in leveling the surface across marble floors to be made in the material furnished by plaintiff; that the workmen for the terrazzo contractor splashed up the cones of the base, then peppered it over and failed to remove the

paper when they had finished; that the painters also splashed paint on the base, etc.

Defendant's case is weakened somewhat by the fact that much evidence very favorable to plaintiff's theory was not abstracted. This evidence is found in an additional abstract filed by plaintiff and discloses clear cut issues of fact on which the master, who saw the witnesses, found in plaintiff's favor. Recent decisions are to the effect that a finding of this kind when approved by the chancellor will not be disturbed unless manifestly against the evidence. Rasedach v. Auw, 364 Ill. 491; Kosakowski v. Bagdon, 369 Ill. 252; Metropolitan Life Ins. Co. v. Shattas, 298 Ill. App. 556; Ramis v. Hanson, 302 Ill. App. 404. We have examined this evidence and are not able to say that the finding of the master and the decree is clearly and manifestly against the weight of it.

In addition to interest the master allowed plaintiff $23.27 for alleged unreasonable and vexatious delay in payment. Plaintiff was entitled to interest from the date the claim was due. (Ill. State Bar Stats. 1939, sec. 1, chap. 82, p. 1976.) This covered all proper allowance for delay. (Ill. State Bar Stats. 1939, sec. 2, chap. 74, p. 1905.) The whole amount found due ($415.61) must be reduced by deducting this item of $23.27. The amount due is $356.67 with interest at 5 per cent from the date same was due until date of final decree. It is urged the costs and charges allowed by the master are excessive. The whole amount claimed for extras was $356.67. The cost of the reference, including stenographic charges and master's fees, amounts to $790.25, a sum which seems exorbitant. As fees to be fixed by the court the master certified 32 hours of services for which $320.00 was claimed and allowed. The issues in the case were simple. The time spent was unreasonable. Ill. State Bar Stats. 1939, sec. 9, chap. 90, p. 2020, provides that master's shall receive compensation as allowed by law. Sections 20 and 20b of the act, 38 and 38b of the statute, chap. 53, pp. 1658-1659, authorize the payment of fees to masters as therein stated. These provide that for examining questions at issue

paper when they had finished; that the polaroid also splashed paint on the jacket, etc.

Defendant's case is materially weakened by the fact that a good evidence very favorable to plaintiff's theory was not introduced. This evidence is found in an additional statement filed by plaintiff and discloses clear cut issues of fact on which the master, who saw the witnesses, found in plaintiff's favor. Counsel declaims too the effect that a finding of this kind when approved by the chancellor will not be disturbed unless manifestly against the evidence. Fraenkel v. Ann, 302 Ill. 401; Fraenkel v. Harden, 309 Ill. 329; Commonwealth Life Ins. Co. v. Chaffee, 288 Ill. 477, 479; Lamie v. Thomas, 298 Ill. App. 404. We have examined this evidence and are not able to say that the finding of the master and the degree is clearly and manifestly against the weight of it.

In addition to interest the master allowed plaintiff $22.27 for alleged unreasonable and vexatious delay in payment. Plaintiff was entitled to interest from the date the claim was due. (Ill. Stats Ann Stats. 1935, par. 2, chap. 32, p. 1076.) This covered all proper allowance for delay. (Ill. Stats Ann Stats. 1935, par. 2, chap. 74, p. 1908.) The whole amount found due (-$12.81) must be reduced by deducting this item of $22.27. The amount due is $270.07 with interest at 6 per cent from the date same was due until date of final decree. It is argued the costs and charges allowed by the master are excessive. The whole amount claimed for extras was $238.97. The cost of the reference, including stenographic charges and master's fees, amounts to $190.32, a sum which seems exorbitant. As fees to be fixed by the court the master certified 32 hours of services for which $200.00 was claimed and allowed. The issues in the case were simple, the time spent was unnecessarily. Ill. Stats Ann Stats. 1935, par. 2, chap. 32, p. 1077, provides that master's shall receive compensation as allowed by law. Section 32 and 33 of the act, 32 and 33 of the statutes, chap. 32, p. 1320-1322, authorize the payment of fees to masters in chancery stated. These provide that for reasonable services at large

and reporting conclusions thereon, the compensation shall be such as the court may deem just. In Klekamp v. Klekamp, 275 Ill. 98; Herpich v. Williams, 300 Ill. 540, and Kerner v. Peterson, 368 Ill. 59, 12 N.E. (2nd) 884, the Supreme court has in substance held reasonable compensation for a master will be less than the compensation received by a chancellor; also that a master may not charge for time unnecessarily spent. The issues in this case, as we have seen, were simple and the time used was in our opinion unnecessary. We hold that $160.00 is reasonable compensation for the actual services performed by the master. His fees for these will be reduced to that sum.

The master charged and was allowed $145.95 for taking and certifying 937 folios of testimony. The reporter certified to 817-1/2 folios only, in which is included 58 typewritten pages (135 folios) of the argument of counsel. The argument was not evidence and should be deducted, leaving only 682-1/2 folios of testimony, for which fees should be allowed (15 cents per folio) in the sum of $102.37. Stenographic charges were allowed to the amount of $199.50. For this service the proper statutory charge is 15 cents per folio, amounting to $102.37. In addition the master claimed and was allowed for taking 832 folios of documentary evidence at 15 cents per folio, $124.80. In computing the amount to be allowed for this service the master included Exhibit 1, consisting of the entire specifications. Only four paragraphs of this exhibit were read into the record or necessary for consideration of the case. These paragraphs constituted only 1-1/2 folios The entire exhibit consists of 146 typewritten pages, 525 folios, which at 15 cents per folio amounts to $78.75. This item of $124.80 should, therefore, be reduced by this amount, making a total sum to be allowed of $46.05. The proper allowance for costs upon this reference we find as follows: Costs to be fixed by the court, $160.00; for taking evidence, 682-1/2 folios at 15 cents per folio, $132.37; for stenographer's fees for taking evidence, 682-1/2 folios at 15 cents per folio, $132.37; for taking documentary evidence, $46.05; total, $470.79

and imposing constitutional threats, the congressmen could to back-up the court her case just. In Clemens v. Clemens, 276 Ill. 94; Sprague v. Gillispie, 300 Ill. 98; and Barnes v. Jackson, 324 Ill. 12; in re: Ill. 2d 1, 1 (1956) 98. We believe every bar is worthless said reasonable compensation for a master will be less than the compensation received by a chancellor; also that a master may not charge for time unnecessarily spent. The issues in this case, as we have seen, were simple and the time used was in our opinion unnecessary. We hold that $180.00 is reasonable compensation for the actual services performed by the master. His fees for these will be reduced to that sum.

The master charged and was allowed $165.00 for taking and certifying 827 folios of testimony. The reporter certified to 324-1/2 folios only, in which is included 22 typewritten pages (182 folios) of the argument of counsel. The argument was not evidence and should be deducted, leaving only 660-1/2 folios of testimony, for which fees should be allowed (15 cents per folio) in the sum of $102.37. Stenographic charges were allowed to the amount of $148.50. For this service the proper statutory charge is 12 cents per folio, amounting to $102.37. In addition the master claimed and was allowed for taking the taking of documentary evidence at 12 cents per folio, $18.00. In computing the amount to be allowed for this service the entire transcript Exhibit 1, consisting of the entire specifications. Only four paragraphs of this exhibit were read into the record or necessary for consideration of the case. These paragraphs constituted only 1-1/2 folios The entire exhibit consists of 182 typewritten pages, 828 folios, which at 12 cents per folio amounts to $99.36. This item of $18.00 should, therefore, be reduced by this amount, making a total sum to be allowed of $66.00. The proper allowance for costs upon this reference we find as follows: costs to be fixed by the court, $180.00; for taking evidence, 660-1/2 folios at 12 cents per folio, $102.37; for stenographer's fees for taking evidence, 660-1/2 folios at 15 cents per folio, $148.87; for taking documentary evidence, 150.00; total, $670.24

This makes for the master $538.42 and for stenographer's charges, $132.37. The decree will be reversed and the cause remanded with directions to enter a decree in conformity with these views.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

304 Ill. App.

40785

In Re

Estate of Katherine W. FRANKLIN, Deceased.

BEN FRANKLIN, Objector Below, Appellant,

vs.

MAMIE SCHLESINGER, Claimant Below and Administratrix with the Will Annexed, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

304 I.A. 583

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 1, 1939, Ben Franklin, surviving husband of Katherine W. Franklin, deceased, filed his notice of appeal from an order entered February 8, 1939, by which his objections to the final report and account of Mamie Schlesinger, administratrix with the will annexed, of the estate of Katherine W. Franklin, deceased, were overruled and the report and account approved and confirmed.

November 17, 1936, Mamie Schlesinger filed her petition in the proceedings of the estate of Katherine W. Franklin, her deceased sister, in the Probate court of Cook county alleging that 48 shares of Union Carbide and Carbon Corporation stock were issued to her in the name of her sister, Katherine W. Franklin, deceased; that the sisters had lived together for many years and that Mrs. Schlesinger gave her sister the money to purchase the stock; that after the certificates for the stock were delivered, they were placed in their joint safety deposit box; that she did not learn the certificates were not in her name until after the death of her sister.

The petition further set up that March 15, 1935, petitioner had delivered $2,000 to her sister to be deposited in the bank. The sister deposited it in her own account in the Northern Trust Company bank and when petitioner learned of this fact she made no objection. The prayer of the petition was that the stock and the money be awarded to petitioner.

In re

Estate of Katherine V. FRANKLIN, Deceased.

Ada Franklin, Objector below, Appellant,

vs.

Hanie Schlesinger, Claimant below and Administrator with the will annexed, Appellee.

Appeal from Cook County.

Mr. Justice O'Connor delivered the opinion of the court.

March 1, 1923, Ada Franklin, surviving husband of Katherine V. Franklin, deceased, filed his notice of appeal from an order entered February 8, 1923, by which his objections to the final report and account of Hanie Schlesinger, administratrix with the will annexed, of the estate of Katherine V. Franklin, deceased, were overruled and the report and account approved and confirmed.

November 17, 1922, Hanie Schlesinger filed her petition in the proceedings of the estate of Katherine V. Franklin, her deceased sister, in the Probate court of Cook county alleging that 48 shares of Union Trucks and Parkes Corporation stock were issued to her in the name of her sister, Katherine V. Franklin, deceased; that the sisters had lived together for many years and that Mrs. Schlesinger gave her sister the money to purchase the stock; that after the certificates for the stock were delivered, they were placed in their joint safety deposit box; that she did not have the certificates nor to her knowledge until after the death of her sister.

The petition further set up that March 16, 1922, petitioner had delivered $3,000 to her sister to be deposited in the bank. The sister deposited it in her own account in the Northern Trust Company bank and when petitioner learned of this fact she made no objection. The prayer of the petition was that the stock and the money be

On the same day, an order was entered appointing an administrator to defend the estate and December 1, 1936, an order was entered which recites that the petition came on to be heard; that the estate was defended by the person appointed by the Probate court; that the court had read the petition, heard the testimony of witnesses in open court and argument of counsel and found the facts substantially as set forth in the petition; that the present value of the Carbide stock was $4,992. Mrs. Schlesinger's claim was allowed for that amount plus the $2,000 or a total of $6,992, as a claim of the 6th class.

September 22, 1937, Ben Franklin filed a petition in which he represented he was the husband of Katherine N. Franklin, deceased, who died June 13, 1936, leaving a last will in which no bequest or devise was made to him; that the sole surviving legatee under the will was Mrs. Schlesinger who was thereafter appointed executrix. It was further alleged that he had been living in California and had no knowledge of the death of his wife until after September 10, 1937; that he desired to renounce under the will and to receive dower in the estate under the statutes. The petition continues and sets up that Mrs. Schlesinger, the executrix, had filed her petition claiming to own the Carbide stock and the $2,000 in the bank, and that pursuant to the prayer of her petition the order of December 1, 1936, was entered and that he was informed and believed his deceased wife was the owner of the stock and "desires leave to contest the said Petition," and an order was entered giving him leave to file his petition and ruling Mrs. Schlesinger to answer within fifteen days.

October 7, 1937, by leave of court, Franklin amended his petition. It covers the same matters as those mentioned in his original petition and in addition other matters were set up about certain insurance policies, etc. which he contended sustained his position that the stock and moneys did not belong to Mrs. Schlesinger. October 11, 1937, Mrs. Schlesinger filed her answer setting up in substance that the stock and money in the bank were her individual

On the same day, an order was entered appointing an administrator to defend the estate and December 1, 1956, an order was issued which recites that the petition came on to be heard; that the estate was defended by the person appointed by the probate court; that the court had read the petition, heard the testimony of witnesses in open court and argument of counsel and found the facts substantially as set forth in the petition; that the present value of the Corbile stock was $4,000. Mrs. Kohlsaat's claim was allowed for that amount plus the $5,000 or a total of $9,000, as a claim of the 3rd class.

September 23, 1957, Ben Franklin filed a petition in which he represented he was the husband of Katherine T. Franklin, deceased, who died June 15, 1956, leaving a last will in which no bequest or devise was made to him; that his wife survived Irvin under the will was Mrs. Kohlsaat; that the Executrix appointed attorneys. It was further alleged that he had been living in California and had no knowledge of the death of his wife until after September 15, 1957; that he desired to renounce under the will and to receive dower in the estate under the statute. The petition continued and set up that Mrs. Kohlsaat, the executrix, had filed her petition claiming to own the Corbile stock and the $4,000 in the bank, and that pursuant to the prayer of her petition the order of December 1, 1956, was entered and that he was informed and believed his deceased wife was the owner of the stock and "desires leave to withdraw the said Petition," and an order was entered giving him leave to file his petition and ruling Mrs. Kohlsaat to answer within fifteen days.

October 7, 1957, by leave of court, Franklin amended his petition. It covers the same matters as those mentioned in his original petition and in addition other matters were set up about marital harmony politics, etc. which he mentioned materials Mr. petition that the stock and money did not belong to Mrs. Kohlsaat. September 11, 1957, Mrs. Kohlsaat filed her answer setting up in substance that the stock and money is the sole and individual

property. December 6, 1937, Franklin filed what he designated a "Supplemental Petition" in which he sets up substantially the same matters as in his original and amended petitions. December 15, 1937, an order was entered which recites the coming on to be heard of the petition and supplemental petition of Franklin to vacate the order of December 1, 1936, and the court "being fully advised in the premises and having heard arguments" of counsel, it was ordered that the prayer of Franklin's petition be denied. Some time thereafter, Mrs. Schlesinger filed her final report and account in which appeared an item showing she had been paid her personal claim of $6,992 which was made up of the value of the stock and the $2,000. Franklin filed objections to this item and April 26, 1938, his objections to the final report came on to be heard and they were overruled. May 21, 1938, Franklin appealed to the Circuit court. November 2, 1938, Mrs. Schlesinger's motion to dismiss the appeal was overruled; February 8, 1939, an order was entered by the Circuit court which recites the cause was regularly called for trial, the parties being represented by counsel; that the court heard the testimony, examined exhibits and found that Franklin's objections to the final account made by him in the Probate court should be overruled and the account approved. It is from this order that the appeal is prosecuted.

On the hearing before the Circuit court, counsel for Franklin called Mrs. Schlesinger as a witness. She testified that at the time of the purchase of the 48 shares of stock, her health was bad and she thought the best way was to have the shares issued in the name of her sister, Mrs. Franklin, "and there would be no trouble of any kind. No trouble if I die, then it falls to her because she is the one. *** When I laid out the money for the stock I put it in her name, so that if I died it was her stock. I did this because I was very sick, and Mr. Miner [her attorney] at his office, it was by his office, I was very bad. I knew that the stock was registered in her name." That Mrs. Franklin, her sister, had no money - "She was buying it for me." She also testified that the $2,000 was her

property. December 6, 1927, Franklin filed what he designated a "Supplemental Petition" in which he sets up substantially the same matters as in his original and amended petitions. December 12, 1927, an order was entered which recites the coming on to be heard of the petition and supplemental petition of Franklin to revoke the order of December 1, 1925, and the court "being fully advised in the premises and having heard arguments" of counsel, it was ordered that the prayer of Franklin's petition be denied. Some time thereafter, Mr. Hollenbeck filed her final report and account in which appeared an item showing she had been paid her personal claim of $4,800 which was made up of the value of the shares and the $2,000. Franklin filed objections to this item and April 26, 1928, his objections to the final report came on to be heard and they were overruled. May 12, 1928, Franklin appealed to the Circuit court. December 6, 1928, Hollenbeck's motion to dismiss the appeal was overruled; February 8, 1929, an order was entered by the Circuit court which recites the cause was regularly called for trial, the parties being represented by counsel; that the court heard the testimony, examined exhibits and found that Franklin's objections to the final account made by him in the Probate court should be overruled and the account approved. It is from this order that the appeal is prosecuted.

On the hearing before the Circuit court, counsel for Franklin called Mrs. Hollenbeck as a witness. She testified that at the time of the purchase of the 48 shares of stock, her health was bad and she thought the best way was to have the shares issued in the name of her sister, Mrs. Franklin, "and there would be no trouble of any kind. He (meaning if I die, then it falls to her because she is the one. ... When I laid out the money for the stock I put it in her name, so that if I died it was her stock. I did this because I was very sick, and Mr. Kiser [her attorney] at his office, if was by his office, I was very bad. I knew that the stock was registered in her name." That Mrs. Franklin, her sister, had no money - "She was buying it for me." She also testified that the $2,000 was her

money, and that "Katherine's husband was Benjamin Franklin. The last time I saw Mr. Ben Franklin was about eighteen years. He never gave her one cent."

Counsel for Franklin contends that "Even if all the testimony of Mamie Schlesinger be taken as true, there is established a completed gift inter vivos of the shares of stock and money by Mamie Schlesinger to Katherine M. Franklin." We are unable to agree with this contention. We think it clear the stock and the money in the bank belonged to Mrs. Schlesinger. She testified she gave her sister the money with which to buy the stock and that it was her money that was deposited in the bank. This was done because her health was poor at the time. The evidence further shows the sisters lived together in Chicago and the husband for many years lived in California and that neither of the sisters heard from him until after Mrs. Franklin's death. Any discrepancies between the allegations of Mrs. Schlesinger's petition and her testimony, when she was called by defendant's counsel, does not show that Mrs. Schlesinger had made a gift of either the stock or the money to Mrs. Franklin.

The learned trial judge, in deciding the case said: "It is very clear that this woman did not give her sister this money as a gift. She gave it to her in a trust relationship. As a tryer of the facts, sitting here as a jury, I am obliged to find from her testimony that she never made a gift. The fact that she admits the falsity of the allegations contained in her petition only goes to her credibility. I am not interested in the question of the sufficiency of the reclamation petition to support a claim."

When Mrs. Schlesinger filed her petition in the Probate court a lawyer was appointed to defend the estate. The court heard the case and allowed the claim. September 22, 1937, Franklin filed his petition and shortly after, another petition and an amendment thereto. Mrs. Schlesinger filed her answer. The matter came on for hearing but apparently no evidence was offered. If Franklin had any

money, and that "Katherine's husband was Benjamin Franklin. The last time I saw Mr. Ben Franklin was about eighteen years. He never gave her one cent."

Counsel for Franklin contends that "even if all the testimony of Claire Dahlenberger be taken as true, there is established a completed gift inter vivos of the shares of stock and money by Mamie Dahlenberger to Katherine K. Franklin." We are unable to agree with this conclusion. In view of the stock and the money in the bank belonged to Mrs. Dahlenberger. The testimony she gave her sister the money with which to buy the stock and that it was her money that was deposited in the bank. This was done because her health was poor at the time. The evidence further shows the sisters lived together in Chicago and the husband for many years lived in California and that neither of the sisters heard from him until after Mrs. Franklin's death. Any discrepancies between the allegations of Mrs. Dahlenberger's petition and her testimony, when she was called by defendant's counsel, does not show that Mrs. Dahlenberger had made a gift of either the stock or the money to Mrs. Franklin.

The learned trial judge, in deciding the case said: "It is very clear that this woman did not give her sister this money as a gift. She gave it to her in a trust relationship. As a trier of the facts, sitting here as a jury, I am obliged to find from her testimony that she never made a gift. The fact that she admits the falsity of the allegations contained in her petition only goes to her credibility. I am not interested in the question of the sufficiency of the preliminary petition to support a claim."

When Mrs. Dahlenberger filed her petition in the Probate court a lawyer was appointed to defend the estate. The court heard the case and allowed the claim. September 22, 1927, Franklin filed his petition and shortly after, another petition and an amendment thereto. Mrs. Dahlenberger filed her answer. The matter came on for hearing but apparently no evidence was offered. If Franklin had any

evidence he should have offered it at that time but he did not. Again, when Mrs. Schlesinger filed her final account, Franklin filed objections to the item which showed the payment of Mrs. Schlesinger's claim. The order recites that the objections came on to be heard but apparently he offered no evidence at that time and his objections were overruled. A third time, when the matter came on before the Circuit court, Franklin offered no evidence except that he called Mrs. Schlesinger. He was given three opportunities by the two courts to present any evidence he had. This he failed to do except by calling Mrs. Schlesinger on the last hearing. What was said in Stoll v. Gottlieb, 305 U.S. 165, we think is applicable here. The court there said: "It is just as important that there should be a place to end as that there should be a place to begin litigation."

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

evidence he should have offered it at that time but he did not. Again, when Mr. Hollenbeck filed her final account, Franklin filed objections to the item which showed the payment of Mr. Hollenbeck's claim. The order recites that his objections were to be heard but apparently he offered no evidence at that time and his objections were overruled. A third time, when the matter came on before the circuit court, Franklin offered no evidence except that he called Mr. Hollenbeck. He was given three opportunities by the the courts to present any evidence he had. This he failed to do except by calling Mr. Hollenbeck on the last hearing. What was said in Ibell v. Griffith, 305 U.S. 188, we think is applicable here. The court there said: "It is just as important that there should be a time by and at that there should be a place to begin litigation."

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and Kennedy, J., concur.

304 Ill. App.

40816

HARRIET B. GRICE, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
JOSEPH H. GRICE, Appellant.	)	COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse an order of the Circuit court of Cook county entered April 27, 1939, whereby he was adjudged guilty of contempt of court for failure to pay alimony, pursuant to orders of court and was committed to jail for a term not to exceed six months unless payment was sooner made.

The record discloses that April 15, 1932, Harriet B. Grice filed her bill for separate maintenance against defendant and April 18, 1932, the court entered an order awarding her $9 per week and $50 solicitor's fees. May 16, 1932, defendant filed his answer. October 11, 1932, plaintiff filed her petition praying that a rule be entered on defendant to show cause why he should not be adjudged in contempt of court for failing to pay alimony as ordered. On the same day an order was entered finding defendant was $99 in arrears and he was ruled to show cause on October 25, 1932, why he should not be adjudged in contempt. A number of other orders were subsequently entered continuing the hearing on the rule to show cause until January 5, 1933, at which time defendant failed to appear and a writ of attachment issued. Afterward defendant was brought into court on the writ and January 11, 1933, the writ was dismissed and the hearing on the rule to show cause continued to January 17 and again to January 20, at which time defendant again failed to appear and another writ was ordered and placed in the hands of the sheriff for his arrest.

December 11, 1935, an order was entered which recites that the cause was regularly reached and called for trial; that the complainant failed to appear and the suit was dismissed. Nothing further

appears to have been done until more than three years and four months had elapsed when plaintiff, on April 26, 1939, filed her petition in which she set up the bringing of the separate maintenance suit, the orders entered in 1932 for the payment of alimony and the rules on defendant to show cause why he should not be adjudged in contempt of court for failure to pay the alimony; that January 20, 1933, a writ of attachment was ordered issued and ever since that date "the sheriff has been unable to find the said defendant and until April 20, 1939 your petitioner has been unable to locate said defendant although she has repeatedly made diligent efforts so to do." That April 20, she located defendant, advised her attorney to have a writ of attachment served; that the following day, April 21, when her attorney "searched the records in the Circuit Court he learned for the first time that this cause was on December 11, 1935, dismissed for want of prosecution." That she was not in a financial position to employ counsel to watch the case after defendant disappeared January 20, 1933.

There also appears in the record another petition filed by plaintiff on the same day, April 26, 1939, in which she goes into more detail and avers that defendant is in arrears in the payment of alimony, $3,050. The petition further set up that if notice were served on him he would again disappear. On the day the petition was filed the court entered an order in which it is recited that the cause came on to be heard upon the sworn petition of plaintiff and it appearing to the court that if notice were given defendant he would conceal himself, it was ordered that the order of "December 11, 1935 dismissing this cause for want of prosecution be and the same is hereby vacated and set aside and this cause is hereby reinstated." On the same day the court entered another order that a writ of attachment issue to the sheriff to produce the body of defendant.

There appear in the record two writs of attachment, one dated January 20, 1933, and the other April 26, 1939, and the return on each of the writs shows that the sheriff executed them by taking defendant into custody April 27, 1939. On the latter date, an order

appears to have been done until more than three years and four months had elapsed when plaintiff, on April 28, 1920, filed her petition in which she set up the bringing of the separate maintenance suit, the orders entered in 1920 for the payment of alimony and the value on defendant's to show cause why he should not be adjudged in contempt of court for failure to pay the alimony; that January 20, 1922, a writ of attachment was ordered issued and over since that date "the sheriff has been unable to find the said defendant and until April 28, 1922 your petitioner has been unable to locate said defendant although she has repeatedly made diligent efforts so to do." That April 28, she located defendant, advised her attorney to have a writ of attachment served; that the following day, April 29, when her attorney "searched the records in the circuit court he learned for the first time that this case had be decided 22, 1920, dismissed for want of prosecution." That she was not in a financial position to employ counsel to work the case after defendant disappeared January 20, 1921.

There also appears in the record another petition filed by plaintiff on the same day, April 28, 1922, in which she goes into detail and gives that information in support of her payment of alimony, $2,000. The petition further set up that if notice were served on him he would again disappear. On the day the petition was filed the court entered an order in which it is recited that the cause came on to be heard upon the sworn petition of plaintiff and it appearing to the court that if notice were given defendant he would again disappear, it was ordered that the order of November 22, 1920 dismissing this cause for want of prosecution be and the same is hereby vacated and set aside and this cause is hereby reinstated." On the same day the court entered another order that a writ of attachment issue to the sheriff to produce the body of defendant.

There appear in the record two writs of attachment, one dated January 20, 1921, and the other April 28, 1922, and the return on each of the writs shows that the sheriff executed them by taking defendant into custody April 27, 1921. In the latter case, he evidently

was entered committing him to jail until he paid $3,050, but not to exceed six months. Afterward defendant moved to vacate this order and all subsequent orders, which were overruled and defendant appeals.

Defendant contends that the court had no jurisdiction to enter the order of April 27, 1939, vacating the order of dismissal entered December 11, 1935; that the court lost jurisdiction thirty days after the order of dismissal was entered, and par. 7, sec. 50, chap. 110, Ill. Rev. Stats. 1939, is cited. On the other side, the position of plaintiff, as stated by her counsel is: "Plaintiff's theory is that the order of December 11, 1935, dismissing the case for want of prosecution was erroneously entered on the supposition that the case was dormant; whereas, as a matter of fact, a writ of attachment for the arrest of the defendant was then in the hands of the sheriff for execution. Thus, the Court had jurisdiction on April 26, 1939, to vacate the order erroneously entered on December 11,1935, and to reinstate the cause." Counsel also seems to rely on sec. 72 of the Civil Practice Act. (Sec. 72, chap. 110, Ill. Rev. Stats. 1939.) By that section a motion was substituted for the writ of error coram nobis. It provides that the motion may be made in writing within five years after the rendition of the final judgment upon reasonable notice. Under that section certain errors of fact not appearing on the face of the record may be corrected upon proper showing. (Marabia v. Thompson Hospital, 309 Ill. 147.) But the motion will not lie where the party seeking relief is guilty of negligence. Loew v. Krauspe, 320 Ill. 244.)

In the instant case there was no showing, nor is any attempt made to excuse the failure to watch the case on the call. The fact that there was a writ of attachment outstanding is no way prevented the case from being heard on the merits or from being disposed of. The court was without jurisdiction to vacate the order of dismissal, and the orders of the court entered subsequent to the order of dismissal are erroneous and must be set aside and vacated.

was entered committing him to jail until he paid $3,050, but not to exceed six months. Afterward defendant moved to vacate this order and all subsequent orders, which were overruled and defendant appeals.

Defendant contends that the court had no jurisdiction to enter the order of April 27, 1938, vacating the order of dismissal entered December 11, 1935; that the court lost jurisdiction thirty days after the order of dismissal was entered, and par. 7, sec. 50, chap. 110, Ill. Rev. State. 1938, is cited. On the other side, the position of plaintiff, as stated by her counsel is: "Plaintiff's theory is that the order of December 11, 1935, dismissing the case for want of prosecution was erroneously entered on the supposition that the case was dormant; whereas, as a matter of fact, a writ of attachment for the arrest of the defendant was then in the hands of the sheriff for execution. Thus, the Court had jurisdiction on April 26, 1938, to vacate the order erroneously entered on December 11, 1935, and to reinstate the cause." Counsel also seems to rely on sec. 72 of the Civil Practice Act. (Sec. 72, chap. 110, Ill. Rev. State. 1938.) By that section a motion was substituted for the writ of error coram nobis. It provides that the motion may be made in writing within five years after the rendition of the final judgment upon reasonable notice. Under that section certain errors of fact not appearing on the face of the record may be corrected upon proper showing. (Markble v. Thompson Hospital, 309 Ill. 147.) But the motion will not lie where the party seeking relief is guilty of negligence. Loew v. Kramage, 320 Ill. 244.)

In the instant case there was no showing, nor is any attempt made to excuse the failure to watch the case on the call. The fact that there was a writ of attachment outstanding is no way prevented the case from being heard on the merits or from being disposed of. The court was without jurisdiction to vacate the order of dismissal, and the orders of the court entered subsequent to the order of dismissal are erroneous and must be set aside and vacated.

The orders appealed from are reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, J., concurs.

Matchett, P. J., dissenting:

The controlling facts here appear to me to be that this cause was dismissed on December 11, 1935, while the sheriff held the writ of attachment for service on defendant, who apparently could not be found. April 26, 1939, the cause was reinstated without notice to defendant. April 27, the following day, plaintiff and defendant both appeared before the court and defendant testified. The court entered an order finding both the parties present and the amount that was due under prior orders and again found defendant guilty of contempt. Defendant did not question the jurisdiction of the court at this time, nor until May 20, thereafter, when he entered a special appearance and for the first time raised that question. His voluntary appearance (as we assume) at the trial on April 27, amounted to a general appearance, which precluded his thereafter questioning the jurisdiction of the court. This was true under the former practice and I think obtains also under the Civil Practice Act, as is indicated by sec. 11 of the Act, sec. 135 of the Statute. (Smith-Hurd Anno., chap. 110, p. 45.)

The orders appealed from are affirmed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

McCurdy, J., concurs.

Kilkenny, P. J., dissenting:

The stipulated facts here appear to me to be full and more are disclosed in Number 11, 1938, which the mortgagee said at attachment for interest on defendant, was apparently about to leave. April 22, 1938, the cause was terminated without notice to defendant. April 27, the following day, plaintiff and defendant both appeared before the court and defendant testified. The court entered an order finding both the parties present and the amount that was due under prior orders and again found defendant guilty of contempt. Defendant did not question the jurisdiction of the court at this time, nor until May 23, thereafter, when he entered a special appearance and for the first time raised that question. His voluntary appearance (as we assume) at the trial on April 27, amounted to a general appearance, which precluded his thereafter questioning the jurisdiction of the court. This was true under the former practice and I think obtains also under the Civil Practice Act, as is indicated by dec. 11 of the Act, see, 106 of the Tables. Fleischmann Dem., supp. 110, p. 40.)

304 ILL. App.

40837

DAVID GOLDSTEIN,
Appellant,

v.

THE PULLMAN COMPANY, a corporation, PULLMAN RAILROAD COMPANY, a corporation, J. M. KURN and JOHN G. LONSDALE, Trustees for St. Louis-San Francisco Railway Company, a corporation, operating under the name of FRISCO LINES, and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

304 I.A. 584

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by him while riding as a passenger in a pullman berth from Kansas City, Missouri to Tulsa, Oklahoma, in a train operated by defendant trustees of the railway company. The return of the sheriff shows he served the summons on the trustees of the railway company by leaving a copy of the summons with F. W. Wilson, an agent employed by the trustees in Cook county. The record of the sheriff further shows that he received "No directions to serve the other within named defendants," viz., The Pullman Company, a corporation and Pullman Railroad Company, a corporation. Defendant trustees filed their written motion to quash the service of process upon them and to dismiss the action as to them for the reason that Wilson was not their agent upon whom service under the law could be had; that the railway company which they were operating was a foreign corporation and had no office or railroad and did no business in Illinois, except to solicit business for the railroad.

In support of their motion the trustees filed two affidavits, one by Wilson in which he swears he was employed in the office of the traffic representative of the trustees; that the railroad was

a corporation organized and existing under the state of Missouri with its principal place of business in St. Louis; that the trustees were both citizens of Missouri; that the lines of the railroad extended from St. Louis southwest through the states of Missouri, Arkansas, Oklahoma and Texas, and that none of the tracks, roadbeds, stations or other fixed equipment were located in Illinois except office furniture and fixtures in the office of the traffic representative in Chicago; that the office in Chicago was maintained solely for the purpose of soliciting the transportation of freight and passengers over the railroad lines wholly without the state of Illinois; that no one connected with the Chicago office had any power and does not sell any tickets or make any contracts for the transportation of freight or passengers over the line of railways operated by the trustees or issue any bills of lading, receive any money or make any freight or passenger contracts on behalf of defendant trustees and that W. S. Merchant is in charge of the Chicago office.

The other affidavit in support of the trustees' motion was by W. S. Merchant, in which he sets up substantially the same facts as those in the affidavit of Wilson and that the trustees "are not transacting business in Illinois within the meaning of the statutes in such case made and provided."

Some months after defendants' motion and affidavits were filed, plaintiff, by leave of court, filed an affidavit in which he swore that "his suit is against J. W. Kurn and John G. Lonsdale, as Trustees for St. Louis-San Francisco Railway Company, a corporation, and not against them individually. *** that the said F. W. Wilson mentioned in the affidavit in the motion of the Trustees to dismiss this cause, is an agent in the employ of J. W. Kurn and John G. Lonsdale, as Trustees for St. Louis-San Francisco Railway Company, a corporation, as provided for by the Civil Practice Act." The motion of the trustees to dismiss the suit as to them was sustained, and plaintiff appeals.

Plaintiff contends that the service on the trustees of the

a corporation organized and existing under the laws of Missouri with its principal place of business in St. Louis; that the trustees were both citizens of Missouri; that the lines of the railroad extended from St. Louis southwest through the states of Missouri, Oklahoma and Texas, and that some of the trains, machines, vehicles or other final equipment were located in Illinois except office furniture and fixtures in the office of the traffic representative in Chicago; that the office in Chicago was maintained solely for the purpose of soliciting the transportation of freight and passengers over the railroad lines mostly within the state of Illinois; that as was connected with the Chicago office had no power and does not sell any tickets or make any contracts for the transportation of freight or passengers over the line of railroad operated by the trustees or issue any bills of lading, receive any money or make any freight or passenger exchanges on behalf of interstate carriers and that T. C. Dorsheck is in charge of the Chicago office.

The other affidavit is signed by the trustees' motion was by T. C. Dorsheck, in which he sets up substantially the same facts as those in the affidavit of Tilden and that the trustees 'are not transacting business in Illinois within the meaning of the statutes in such case made and provided.'

Some months after defendants' motion and affidavits were filed, plaintiff, by leave of court, filed an affidavit in which he swore that his suit is against L. F. Dunn and John T. Lonsdale, as Trustees for St. Louis-San Francisco Railway Company, a corporation, and not against them individually. *** That the suit T. C. Crane mentioned in the affidavit in the motion of the Trustees to dismiss this cause, is an agent in the employ of L. F. Dunn and John T. Lonsdale, as Trustees for St. Louis-San Francisco Railway Company, a corporation, as provided for in the first Crawford Act.' The motion of the trustees to dismiss the suit as to them was sustained, and plaintiff appeals.

Plaintiff contends that the service on the trustees of the

railway company, by leaving a copy with Wilson in Chicago, was authorized by virtue of sec. 19 of the Civil Practice Act. (Sec. 19, chap. 110, Ill. Rev. Stats. 1939.) That section provides: "Any receiver or trustee of any incorporated company *** may be served with process by leaving a copy thereof with such receiver or trustee, if found in the county where the action is brought, and if not so found, then by leaving such copy with any agent in the employ of such receiver or trustee who may be found in the county where the action is brought." We are unable to agree with plaintiffs' contention. Booz v. Texas & Pacific Ry. Co., 250 Ill. 376; Bull & Co. v. Boston & Maine R.R. Co., 344 Ill. 11.

In the Booz case, suit was brought in the Municipal court of Chicago against the railway company to recover the value of an overcoat alleged to have been lost by plaintiff through the negligence of the railway company while plaintiff was a passenger on one of its trains between two stations in Louisiana. The return of the bailiff showed he had served the summons on the chief clerk and agent of defendant in Chicago. A motion to quash the service was made. Defendant was a Texas corporation and operated its lines of road in Texas and Louisiana; that it never owned, leased or operated any road or had any principal office in this state and the cause of action did not arise in Illinois; that the agent upon whom the summons was served was a soliciting passenger agent for several roads, including defendant. The only business done in Chicago was soliciting passenger and freight transportation for the railway company over its lines. The court held the service bad and quashed the return.

In the Bull case (344 Ill. 11-21), the court said: "The question of the jurisdiction of a court to render a judgment in such case is one of due process of law, and if the defendant was not amenable to service of process within the State a judgment rendered against him in a suit in trespass or trespass on the case is not in pursuance of the due process of law guaranteed by the constitution.

railway company, by leaving a copy with clerks in Chicago, was authorized by virtue of sec. 12 of the Civil Practice Act. (Sec. 12, ch. 110, Ill. Rev. Stats. 1949.) That section provides: "Any receiver or trustee of any incorporated company *** may be served with process by leaving a copy thereof with such receiver or trustee, if found in the county where the action is brought, and if not so found, then by leaving such copy with any agent in the employ of such receiver or trustee who may be found in the county where the action is brought." We are unable to agree with plaintiffs' contention. Ryan v. Tucker & Pacific Ry. Co., 230 Ill. 276; Hull & Co. v. Chicago & Alton R.R. Co., 244 Ill. 11.

In the Ryan case, suit was brought in the municipal court of Chicago against the railway company to recover the value of an overcoat alleged to have been lost by plaintiff through the negligence of the railway company while plaintiff was a passenger on one of its trains between two stations in Louisiana. The return of the bailiff showed he had served the summons on the chief clerk and agent of defendant in Chicago. A motion to quash the service was made. Defendant was a Texas corporation and operated its lines of road in Texas and Louisiana; that it never owned, leased or operated any road or had any physical office in this state and the sums of money which it active in Illinois; that the agent upon whom the summons was served was a soliciting passenger agent for several roads, including defendant. The only business done in Chicago was soliciting passenger and freight transportation for the railway company over its lines. The court held the service bad and quashed the return.

In the Hull case (244 Ill. 11-21), the court said: "The question of the jurisdiction of a court to render a judgment in such case is one of due process of law, and if the defendant was not amenable to service of process within the state a judgment rendered against him in a suit in trespass or trespass on the case is not in violation of the due process of law guaranteed by the constitution.

(Booz v. Texas and Pacific Railway Co., 250 Ill. 376.) To render a foreign corporation amenable to process in this State it must appear that the corporation was carrying on its business in this State and that such business was transacted by some agent appointed by or representing the corporation in the State. The Boston and Maine Rail road had no line of railway and had never operated a car or train of cars within this State. It had never transacted any portion of its business here or maintained an office, agent, *** within this State for the transaction of any portion of its business except an office in Chicago manned by its representatives *** for the sole and only purpose of soliciting traffic and transportation originating in this State."

Furthermore, it has been held that the bringing of an action against a railroad company, in a state where the facts in connection with the transaction of business were substantially the same as the facts in the instant case, would impose an unreasonable burden on interstate commerce and could not be maintained. London Guaranty & Accident Co. Ltd. v. Watte, 234 Ill. App. 497; Davis v. Farmers Co-operative Co., 262 U.S. 312; Michigan Central R.R. Co. v. Mix, 278 U.S. 492. We think the court did not err in quashing the service of summons and dismissing the suit as to the trustees of the railway company.

Counsel for plaintiff further contends that the court erred in quashing the service because there was a disputed question of fact - that Wilson, in his affidavit, swore he was not an authorized agent and plaintiff filed a counter affidavit in which he swore Wilson was an agent of the trustees, operating the railway company; that this raised a question of fact and should have been submitted to a jury since plaintiff demanded a trial by jury, and sec. 48 of the Civil Practice Act (sec. 48, chap. 110, Ill. Rev. Stats. 1939), is relied upon. That section provides for the involuntary dismissal of suits and where the grounds urged for dismissal do not appear on the face of the complaint, defendants' motion may be supported by affidavits and

(Dunn v. Texas and Pacific Railway Co., 200 Ill. App. 1.) To render a foreign corporation amenable to process in this State it must appear that the corporation was carrying on its business in this State and that such business was transacted by some agent appointed by or representing the corporation in the State. The Boston and Maine Rail road had no line of railway and had never operated a car or train of cars within this State. It had never transacted any portion of its business here or maintained an office, agent, "within this State for the transaction of any portion of its business except an office in Chicago manned by its representatives" "for the sole and only purpose of soliciting traffic and transportation originating in this State."

Furthermore, it has been held that the bringing of an action against a railroad company, in a state where the facts in connection with the transaction of business were substantially the same as the facts in the instant case, would impose an unreasonable burden on interstate commerce and could not be maintained. London Guarantee & Accident Co. Ltd. v. Hayes, 226 Ill. App. 497; Davis v. Lehigh Coal Co., 226 I.A. 311; Kimbrough Contract Co. v. Ill. Cent. R.R. 692. We think the court did not err in quashing the service of summons and dismissing the suit as to the trustees of the railway company.

Counsel for plaintiff further contends that the court erred in quashing the service because there was a disputed question of fact - that Wilson, in his affidavit, swore he was not an authorized agent and plaintiff filed a counter affidavit in which he swore Wilson was an agent of the trustees, operating the railway company; that this raised a question of fact and should have submitted to a jury since plaintiff demanded a trial by jury, and see. 49 of the Civil Practice Act (see, ed. chap. 110, Ill. Rev. Stats. 1957), is valid upon. That section provides for the involuntary dismissal of suits and where the grounds urged for dismissal do not appear on the face of the complaint, defendants' motion may be supported by affidavits and

if, upon the hearing of such a motion, plaintiff presents evidence denying the facts alleged in the affidavit supporting defendants' motion to dismiss and disputed questions of fact are involved, "the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury." But we think plaintiff's affidavit was insufficient to raise such an issue. Wilson and Merchant, in their affidavits, set up facts which, if true, would support their conclusions that Wilson was not an agent of the trustees, while the affidavit filed by plaintiff sets up no facts but only a conclusion that Wilson was an agent.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

If, upon the hearing of such a motion, plaintiff produces evidence bearing the facts alleged in the affidavit supporting defendants' motion to dismiss and disputed questions of fact are involved, "the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury." But we think plaintiff's affidavit was insufficient to raise such an issue. Wilson and Ferguson, in their affidavits, set up facts which, if true, would support their conclusion that Wilson was not an agent of the trustees, while the affidavit filed by plaintiff sets up no facts but only a conclusion that Wilson was an agent.

The judgment of the circuit court of Cook county is affirmed.

Affirmed.

McSurely, P. J., and McDonald, J., concur.

40846

HENRY L. KANE and JOHN E. NORTHRUP, Appellees,	)	APPEAL FROM
v.	)	SUPERIOR COURT
NATHAN BORIN, Appellant.	)	COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, practicing lawyers of Chicago, brought suit against defendant to recover $3,850 claimed to be due them for services rendered defendant under the terms of an oral contract. There was a jury trial and at the close of all the evidence the court directed the jury to return a verdict for $1,750 in favor of plaintiffs which was accordingly done, judgment entered on the verdict and defendant appeals.

Plaintiffs' theory is that shortly before June 14, 1935, there was an oral agreement between the parties by which defendant agreed to pay plaintiffs for legal services to be rendered by them in connection with litigation then pending in California; that defendant would pay plaintiffs 35% of any amount recovered by defendant in the suit in California, over and above $25,000, which amount defendant represented had been offered him in settlement prior to plaintiffs' employment; that "in the event plaintiffs discovered that no such sum had been offered in settlement, then they were to receive 35% of any amount recovered over and above any sum of money which had been offered prior to June 14, 1935;" that June 15, 1935, plaintiffs wrote defendant a letter embodying the terms of the oral contract. There was evidence tending to show that the California litigation had been settled for $11,000, of which defendant received at the time $5,000 and the balance of $6,000 was to be paid at a later date. The court allowed plaintiffs 35% of the $5,000 or $1,750.

Plaintiffs' position on the trial was that after the making of the contract they discovered no offer of settlement had been made

Plaintiffs, practicing lawyers of Chicago, brought suit against defendant to recover $3,000 claimed to be due them for services rendered defendant under the terms of an oral contract. There was a jury trial and at the close of all the evidence the court directed the jury to return a verdict for $1,750 in favor of plaintiffs which was accordingly done. Judgment entered on the verdict and defendant appeals.

Plaintiffs' theory is that shortly before June 14, 1928, there was an oral agreement between the parties by which defendant agreed to pay plaintiffs for legal services to be rendered by them in connection with litigation then pending in California; that defendant would pay plaintiffs 33⅓ of any amount recovered by defendant in the suit in California, over and above $25,000, which amount defendant represented had been offered him in settlement prior to plaintiffs' employment; that "in the event plaintiffs discovered that no such sum had been offered in settlement, then they were to receive 33⅓ of any amount recovered over and above any sum of money which had been offered prior to June 14, 1928;" that June 15, 1928, plaintiffs wrote defendant a letter embodying the terms of the oral contract. There was evidence tending to show that the California litigation had been settled for $111,000, of which defendant received at the time $3,000 and the balance of $8,000 was to be paid at a later date. The court allowed plaintiffs 33⅓ of the $8,000 or $1,750.

Plaintiffs' position is the total sum that after the making of the contract they discovered in view of settlements had been made

at the time the contract was entered into but that subsequently defendant was to receive $11,000 in settlement of the California litigation. On the other side, defendant's position was that prior to the making of the contract he had received an offer to settle the California suit for $25,000. On the trial plaintiffs' letter of June 15, 1935, to defendant, above referred to, which plaintiffs contended embodied the terms of the contract, was received in evidence.

Henry L. Kane, one of plaintiffs, testified that the latter part of June, 1935, from his office in Chicago, he talked over the telephone with Mr. Miler in California, who was attorney for Borin in the California litigation; that defendant was listening in on another wire in plaintiffs' office; that Miler told Kane no offer had been made Borin in settlement of the California litigation. In putting in the defense defendant took the stand and was interrogated as to his version of the telephone conversation. Objection was made to the form of a question put to defendant by his counsel and after some discussion between court, counsel and the witness, the court called for the letter of June 15, 1935, which plaintiffs contend embodied the terms of the contract and held that the witness could not answer the question because it would tend to vary the terms of the letter. Counsel for defendant then stated that he offered to prove by the witness that during the telephone conversation Borin stated to Miler that Miler had theretofore advised Borin that an offer of $25,000 had been made to settle the suit and Miler replied he did have such an offer but was not sure that offer was still good.

We think the evidence was clearly admissible and the court erred in refusing to permit the witness to testify. Mr. Kane had given his version of the telephone conversation and defendant should have been permitted to give his version. The testimony of this witness in no way tended to vary the terms of the letter of June 15, but only went to the question as to whether an offer had been made prior to the date of the letter.

Counsel for plaintiffs say "where it appears to the Court,

at the time the contract was entered into but that subsequently defendant was to receive $11,000 in settlement of the California litigation. On the other side, defendant's position was that prior to the making of the contract he had received an offer to settle the California suit for $25,000. On the total plaintiff's letter of June 10, 1929, to defendant, above referred to, which plaintiff contended embodied the terms of the contract, was received in evidence.

Henry L. Zane, one of plaintiffs, testified that the latter part of June, 1928, from his office in Chicago, he talked over the telephone with Mr. Miller in California, who was attorney for Doris in the California litigation; that defendant was listening in on another wire in plaintiffs' office; that Miller told Zane an offer had been made Doris in settlement of the California litigation. In putting in the defense defendant took the stand and was interrogated as to his version of the telephone conversation. Objection was made to the form of a question put to defendant by his counsel and after some discussion between court, counsel and the witness, the court ruled for the latter of June 10, 1928, which plaintiffs contend embodied the terms of the contract and held that the witness could not answer the question because it would tend to vary the terms of the letter. Counsel for defendant then stated that he offered to prove by the witness that during the telephone conversation Doris stated to Miller that Miller had theretofore advised Doris that an offer of $25,000 had been made to settle the suit and Miller replied he did have such an offer but was not sure that other was still open.

We think the evidence was clearly admissible and the court erred in refusing to permit the witness to testify. Mr. Zane had given his version of the telephone conversation and defendant should have been permitted to give his version. The testimony of this witness in no way tended to vary the terms of the letter of June 10, but only went to the question as to whether an offer had been made prior to the date of the letter.

Counsel for plaintiffs say there it appears to the court,

at the close of all the evidence and as a matter of law, that there is only one conclusion or verdict at which a jury could arrive and that if such jury should render a different verdict, it would become necessary for the Court to set such verdict aside or render a judgment non obstante veredicto, then the Court should direct a verdict in such case." This is an inaccurate statement of the law. Obviously if the court was of opinion that after a verdict was returned he would have to set it aside and render judgment notwithstanding the verdict, then there would be no error in directing a verdict. But if the court was of opinion that if a verdict were rendered and that it was his duty to set it aside because it had not been sustained by a preponderance of the evidence, the court would not be warranted in directing a verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206, 212. In that case the court said: "In passing upon a motion for a peremptory instruction the question of the preponderance of the evidence does not arise at all. Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial, ***

"When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied." (See Popadowski v. Bergaman, No. 40813, which we filed this day.)

We think the court erred in directing a verdict but since

at the close of all the evidence and as a matter of law, that there is only one conclusion or verdict at which a jury could arrive and that if such jury should render a different verdict, it would become necessary for the court to set such verdict aside or render a judgment non obstante veredicto, then the court should direct a verdict in such case." This is an unnecessary statement of the law. Obviously if the court was of opinion that after a verdict was returned he would have to set it aside and render judgment notwithstanding the verdict, then there would be no error in directing a verdict. But if the court was of opinion that if a verdict were rendered and that it was his duty to set it aside because it had not been sustained by a preponderance of the evidence, the court could not be warranted in directing a verdict. Libby, McNeill & Libby v. Cary, 242 Ill. 366, 372. In that case the court said: "In passing upon a motion for a peremptory instruction the question the quantum of the preponderance of the evidence does not arise at all. Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and be may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial. ..."

"When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied." (See Torchowski v. Ziemann, No. 4081, which we filed this day.)

In which the court erred in directing a verdict for the

there may be a retrial of the case, we think we ought to pass on another contention made by defendant, that the court erred in refusing to permit defendant to offer in evidence the letter of June 19, 1935, which he claimed to have written plaintiff Kane in reply to plaintiffs' letter of June 15. Before the trial defendant's counsel served plaintiffs with a notice to produce the original of the letter of June 19. Plaintiffs claimed they had received no such letter. A photostatic copy of the purported letter is in the record but it was excluded on the ground there was no evidence that the envelop in which it was put had been stamped or mailed. But there was evidence to the effect that the letter had been read over the telephone before it was said to have been mailed to Mr. Kane. Whether the letter was admissible, although not mailed, we do not pass upon, but the rule in such a situation is stated in Koch v. Pearson, 219 Ill. App. 468.

For the error in directing a verdict, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and McSurely, J., concur.

there may be a rebuttal of the case, we think we ought to pass on another contention made by defendant, that the court erred in refusing to permit defendant to offer in evidence the letter of June 12, 1907, which he claimed to have written plaintiff Ewen in reply to plaintiff's letter of June 12. Before the trial defendant's counsel served plaintiffs with a notice to produce the original of the letter of June 12. Plaintiffs claimed they had received no such letter. A photostatic copy of the purported letter is in the record but it was excluded on the ground there was no evidence that the envelop in which it was put had been stamped or mailed. But there was evidence to the effect that the letter had been read over the telephone before it was said to have been mailed to Mr. Ewen. Whether the letter was admissible, although not mailed, we do not pass upon, but the rule is much a discussion is stated in Ewen v. Peacock, 114 Ill. App. 489.

For the error in directing a verdict, the judgment of the superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSURLY, P.J., and McPHERSON, J., concur.

304 Ill. App.

40634

ROBIN P. ALLEN,
Appellant,

v.

220 EAST WALTON PLACE BUILDING CORPORATION, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

304 I.A. 585

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 23, 1933, plaintiff filed his bill alleging that he purchased at par $8,000 of bonds November 21, 1927, of an issue of $550,000, 6% bonds from the house of S. W. Straus & Co., secured by a trust deed on the property owned by defendant building corporation; that the trust deed had been foreclosed and the property sold for $75,000, of which $800 (which he refused to accept) was available to him on account of his investment in the bonds. He sought to impeach the foreclosure decree on the ground of fraud. After the case was at issue it was referred to a master in chancery who took the evidence, made up his report and recommended the suit be dismissed for want of equity. After objections and exceptions to the report were overruled, a decree was entered in accordance with the recommendation of the master and plaintiff appeals.

The record discloses that in 1920 defendant, Hugh McLennan, the owner of the property, obtained a construction loan of $375,000 from S. W. Straus & Co. secured by a mortgage on the property. Seven years later, November 21, 1927, Straus & Co. and McLennan refinanced the old bond issue and a new issue of $550,000 and trust deed were executed by the 220 East Walton Place Building Corporation, the property at the time having been conveyed by McLennan to the building corporation. The bonds were sold to the public and plaintiff purchased $8,000 of the issue at par. The bond issue of $375,000, on which McLennan was personally liable was paid out of the proceeds derived from the sale of the new issue. At the time of the execution of the

304 N.E. 2d

MARCH 7, 1949.

Appeals from

v.

THE EAST SALTON FLAME BUILDING CORPORATION, et al.,
Appellees.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 22, 1949, plaintiff filed his bill alleging that he purchased at par 15,000 of bonds December 21, 1927, of an issue of $800,000, 6% bonds from the house of E. C. Stone & Co., secured by a trust deed on the property owned by defendant building corporation; that the trust deed had been foreclosed and the property sold for $78,000, of which $800 (which he refused to accept) was available to him on account of his investment in the bonds. He sought to impeach the foreclosure decree on the ground of fraud. After the case was at issue it was referred to a master in chancery who took the evidence, made up his report and recommended the suit be dismissed for want of equity. After objections and exceptions to the report were overruled, a decree was entered in accordance with the recommendation of the master and plaintiff appeals.

The record discloses that in 1920 defendant, John Coleman, the owner of the property, obtained a construction loan of $375,000 from E. C. Stone & Co. secured by a mortgage on the property. Seven years later, December 21, 1927, Stone & Co. and Coleman refinanced the old bond issue and a new issue of $800,000 and trust deed were made by the East Salton Flame Building Corporation, the property at the time having been conveyed by Coleman to the building corporation. The bonds were sold to the public and plaintiff purchased 15,000 of the issue at par. The bond issue of $375,000, on which Coleman was personally liable was paid out of the proceeds derived from the sale of the new issue. At the time of the execution of the

new bond issue and the trust deed by the building corporation, it conveyed the premises back to McLennan but he did not record the deed until April 19, 1932, which was after the building corporation defaulted in payment of taxes, interest and some of the bonds. The house of issue was paid $38,500 as a commission, and the balance of the proceeds of the new issue, amounting to about $250,000, was paid to McLennan or to his wholly owned corporation, as plaintiff contends, or to take up a second mortgage on the property, as contended by defendants.

Straus & Co. issued a circular describing the property. The building, ten stories in height, contained sixteen eight room apartments, two seven room apartments and one eight room bungalow. It was valued at $474,377 and the land at $335,720, the total value being placed by an appraiser at $810,097. It was located, as the building corporation's name would indicate, on East Walton Place on the near north side of Chicago, near the lake. The circular showed a net income for six months of $69,644 and stated there would be monthly deposits of principal and interest made.

Plaintiff contends he was induced to buy the bonds on account of the representations made in the circular. That at the time of the new bond issue there was a default in payment of taxes for 1927, and afterward there were further defaults in the payment of taxes for the years 1928, 1929 and 1930, as a result of which a tax receiver was appointed; that the monthly deposits were not made from November, 1931 to April, 1932, so that no money was available to pay the principal and interest which came due April 10, 1932.

The evidence further shows that December 22, 1931, the trustee served a written notice on the mortgagor that defaults had been made in the required monthly deposits for the months of November and December, 1931. April 11, 1932, the trustee, pursuant to an agreement with the mortgagor, entered into possession of the property and the next day McLennan recorded the deed by which the property was conveyed to him by the building corporation. April 21, 1932, the

her total loss and the trust deed by the building corporation, it convey the premises back to mulcahey but he did not repay the loan until April 19, 1922, which was after the building corporation defaulted in payment of taxes, interest and some of the bonds. The house of ramo was paid $28,000 as a commission, and the balance of the proceeds of the new loans, amounting to about $180,000, was paid to mulcahey or to his wholly owned corporation, as plaintiff contends, or be held by a second mortgage on the property, as contended by defendants.

Ramo & co. issued a circular describing the property. The building, two stories in height, contained sixteen eight room apartments, two seven room apartments and one eight room bungalow. It was valued at $474,377 and the land at $158,750. The total value being placed by an appraiser at $633,127. It was located, as the building corporation's name would indicate, on lake sylvan (?) on the west north side of Chicago, near the lake. The circular showed a net income for six months of $18,944 and stated there would be monthly deposits of principal and interest made.

Plaintiff contends he was induced to buy the bonds on account of the representations made in the circular. That at the time of the new bond issue there was a default in payment of taxes for 1917, and afterward there were further defaults in the payment of taxes for the years 1918, 1919 and 1920, as a result of which a tax receiver was appointed; that the monthly deposits were not made from november,1921 to april, 1927, as that no money was available to pay the principal and interest which came due april 10, 1922.

The evidence further show that December 22, 1921, the trustee moved a written notice on the mortgagor that defaults had been made in the required monthly deposits for the months of november and December, 1921. April 11, 1922, the trustee, pursuant to an agreement with the mortgagor, entered into possession of the property and the next day mulcahey received the keys by which the property was secured to him by the building corporation. April 21, 1922, the

trustee accelerated the maturity of the unpaid bonds which then aggregated $518,000, and on that day filed his bill to foreclose the lien of the trust deed. The bondholders were not made parties for the reason that, under the terms of the trust deed, the trustee represented them.

A bondholders' committee was organized April 5, 1932, of the 'active officers' of Straus & Co. which solicited the deposit of bonds and from time to time thereafter, approximately 92% of the bonds were deposited with the committee. October 21, 1932, a decree of foreclosure was entered and on that day there appears in the record "Notice of Plan of Reorganization" which, about that time, was sent to each of the bondholders by the bondholders' committee. The plan proposed that a new corporation be organized known as the "Walton Place Building Corporation" to acquire the title to the property; that 90% of the capital stock of this corporation was to be issued to the depositing bondholders in exchange for their bonds; and 10% to McLennan, the owner of the equity of redemption, in consideration of his co-operation and the conveyance of his equity of redemption; that the stock in the new company would be held by three trustees named by the bondholders, the trustees to vote the stock and manage the property for a period of ten years; that the bondholders' committee was to receive 1% of the face amount of the deposited bonds to defray the expenses of reorganization and the depositary 3/4 of 1% of the face amount of the bonds deposited.

Afterward, December 30, 1932, the property was sold by the master (in accordance with the terms of the decree) to the nominee of the bondholders' committee for $75,000, subject to taxes aggregating $53,800. Of the $75,000, $24,134.96 was paid in cash and the balance, $50,865.04, in bonds. February 1, 1933, the master's report of sale and distribution was filed and on the 21st an order was entered approving the report and a deficiency decree entered. It recites that due notice of the filing and presentation of the report and the application for its approval had been given to all parties in interest;

Trustee maintained the security of the repaid bonds which have been purchased $312,000, and on their day filed his bill to foreclose the lien of the first mort. The bondholders were not made parties to the action because that, under the terms of the trust deed, the trustee represented them.

A bondholders' committee was organized April 8, 1932, of the "active creditors" of Issues A-B, which solicited the deposit of bonds and from time to time thereafter, approximately 90% of the bonds were deposited with the committee. October 21, 1932, a decree of foreclosure was entered and on that day there appears in the record "notice of plan of reorganization" which, about that time, was sent to each of the bondholders by the bondholders' committee. The plan proposed that a new corporation be organized known as the "Palms Building Corporation" to acquire the title to the property; that 90% of the capital stock of this corporation was to be issued to the depositing bondholders in exchange for their bonds and 10% to the promoters, the owner of the equity of redemption, in consideration of his co-operation and the conveyance of his equity of redemption; that the stock in the new company would be held by three trustees named by the bondholders, the trustees to vote the stock and manage the property for a period of ten years; that the bondholders' committee was to receive 1% of the face amount of the deposited bonds to defray the expense of reorganization and the depositary 1/4 or 1% of the face amount of the bonds deposited.

Thereafter, January 30, 1933, the property was sold by the master in foreclosure with the bids of the Jarvis; the amount of the bondholders' committee for $12,000, subject to their expenses $20,000. Of the $72,000, $24,24.96 was paid in cash and the balance, $50,000.00, in bonds. February 3, 1933, the master's report of sale and distribution was filed and on the 23rd of [illegible] was entered approving the report and a deficiency decree entered. It results that the entire of the filing and prosecution of the report and the expenses for its preparation and been given to all service in interest

that the court examined the report, "and the court having heard discussion by counsel as to the plan of reorganization of the property and premises in question and of the participation therein of the bondholders," found that the master had proceeded in all things in accordance with the decree of foreclosure and a deficiency decree of $498,612.12 was entered against defendant, 220 East Walton Place Building Corporation, the maker of the bonds and trust deed. Execution was awarded. The master further found that pursuant to the plan of reorganization, the legal title to the property was conveyed to the Walton Place Building Corporation, the new company, and certificates of beneficial interest representing the shares of stock in the new company issued to the depositing bondholders and to McLennan, the former owner of the equity of redemption. The stock was held by three trustees and a new mortgage for $55,000 was executed by the new corporation, the proceeds of which were used principally to pay taxes for the years 1927 to 1932. Two days after the report of sale and distribution was approved by the court, plaintiff filed the instant suit.

The master found, in effect, that plaintiff had failed to prove any fraud on behalf of defendants, but on the contrary, that what defendants did in issuing the $550,000 bond issue, selling the bonds, taking up the prior mortgage executed by McLennan, the transfer of the property, the formation of the new or second corporation and the plan of reorganization, were all warranted by the provisions of the trust deed under the circumstances and by the evidence, and that what was done was in the best interest of all of the bondholders; that while there was some dereliction on the part of the trustee in reference to the default in the payment of taxes and the failure to make the monthly deposits (as the trust deed provided), yet bondholders were not prejudicially affected but that what defendants did was in all respects as beneficial to the bondholders as could be expected.

About the time the bill to foreclose the lien of the trust deed was filed, viz., in 1932, a number of similar suits were brought and the opinions of this court and of the Supreme court show that the

law involved in such proceedings was not then clearly settled but was in a state of flux. There was some uncertainty during the period of depression whether in foreclosure suits the court could fix an upset price for properties being foreclosed and compel the trustees named in the trust deeds to bid in the property for the benefit of the bondholders for not less than the upset price, in the absence of other bidders; whether plans of reorganization could be approved by the courts; whether bondholders could sue on their bonds where the trust deed provided otherwise, and some other questions.

In Straus v. Chicago Title & Trust Co., 273 Ill. App. 63, 67, we held: "It is a universal rule of law that a trustee is in duty bound to see that the property intrusted to his care is not lost to the beneficiaries;" that courts would take judicial notice that property sold under foreclosure seldom, if ever, brought a figure at all commensurate with its value; that during the great depression in the values of real estate, property at a foreclosure sale would bring far less than at normal times and in such case that the court should fix an upset price and unless bidders at the sale would make a cash bid for such price, the court should direct the trustee to bid in the property for the amount of the indebtedness for the use of the bondholders where the bonds and the trust deed were executed by a building corporation which had no property except the property covered by the mortgage, in which case, a deficiency would be of no substantial value and that in such emergency, a court of equity for the preservation of the trust and the protection of the beneficiary from loss, would authorize the trustee to depart from the terms of the trust agreement. (Meyers v. American Nat. Bank & Trust Co. 277 Ill. App. 378, 387.)

We again followed this rule in Chicago Title & Trust Co. v. Robin, 278 Ill. App. 20, but the Supreme court in the Robin case held that the court was not warranted in fixing an upset price, 361 Ill. 261. But in Levy v. Broadway-Carmen Building Corp. 368 Ill. 279, the court, in referring to what was said in the Robin case, on the question

has involved in such proceedings was not inequitably uniform but was in a state of flux. There was some uncertainty during the period of depression whether in foreclosure suits the court could fix an upset price for properties being foreclosed and sell the property based on the trust deed to bid in the property for the benefit of the bondholders for not less than the upset price, in the absence of other bidders; whether plans of reorganization could be approved by the courts; whether bondholders could sue on their bonds where the trust deed provided otherwise, and many other questions.

In Dawson v. Chicago Title & Trust Co., 277 Ill. 434, 437, we held: "It is a universal rule of law that a trustee is in duty bound to see that the property intrusted to his care is not lost to the beneficiaries; that courts would take judicial notice that property sold under foreclosure sales, if over, brought a figure at all commensurate with its value; that during the great depression in the values of real estate, property at a foreclosure sale would bring far less than at normal times and in such case that the court should fix an upset price and unless bidders at the sale would make a cash bid for such price, the court should direct the trustee to bid in the property for the amount of the indebtedness for the use of the bondholders where the bonds and the trust deed were executed by a building corporation which had no property except the property covered by the mortgage, in which case, a deficiency would be of no substantial value and that in such emergency, a court of equity for the preservation of the trust and the protection of the beneficiary from loss, would authorize the trustee to depart from the terms of the trust agreement. (Kenyon v. Western Nat. Bank & Trust Co. 277 Ill. 434, 437, 437.)

In again following this rule in Dawson Title & Trust Co. v. Cohen, 279 Ill. App. 30, but the opposite result is the Davis case that the court was not warranted in fixing an upset price, 281 Ill. 481. Yet in Levy v. Dreyfuss-Jones Building Corp. 286 Ill. 479, the court, in applying the same rule that was said in the Cohen case, on the question

of the fixing of an upset price, stated, "what we said on that subject is not adhered to." And in Straus v. Anderson, 266 Ill. 426, 433, the court said, the "court has the power to fix an upset price prior to the sale, (Levy v. Broadway-Carmen Building Corp. supra,) but has no authority, under the provisions of the trust deed in this case, to direct the trustee to bid in the property for the benefit of all the bondholders." In Oswianza v. Zengler & Mandell, Inc., 273 Ill. App. 239, where the provisions of the trust deed vested the exclusive right to sue on the bonds in the trustee or in a certain percentage of the bondholders in case of the trustee's failure to act, we held that it did not preclude the right of a bondholder to sue at law on the bond and that if the holder of bonds could not sue on them they would not be negotiable. The judgment was affirmed, 358 Ill. 304. But the Supreme court did not squarely pass on the question whether in such case the bonds would be non-negotiable. The court reached this conclusion upon a consideration of the provisions of the trust deed.

In Chicago Title & Trust Co. v. Robin, 361 Ill. 261, it was held that a trustee may be authorized by the express provision in the trust deed to bid for the trust property at a foreclosure sale, but where there was no such express provision, his duty was simply to sell the property to satisfy the debt.

In First Nat. Bank v. Bryn Mawr Building Corp., 368 Ill. 409, it was held that although the language of a trust deed (securing a large bond indebtedness on an apartment building) may be construed to authorize the trustee to bid at the foreclosure sale for all the bondholders, yet the trustee is vested with discretion, subject to the control of the chancellor, and that failure of the trustee to bid where it was doubtful whether such bid would benefit the bondholders more than a plan of reorganization submitted for approval by a bondholders' protective committee, the chancellor did not err in refusing to require the trustee to bid.

In Straus v. Anderson, 283 Ill. App. 342, the Third Division of this court held that in a foreclosure suit the court was without

of the filing of an upset price, stated, "such as said on that sub-part is not valuable to." In re Ziegler v. Gardiner, 208 III. 624, 631, the court held, the "court has the power to fix an upset price prior to the sale." Cf. v. Gardiner-Johnson Building Corp. supra.) But has no authority, under the provisions of the trust deed in this case, to direct the trustee to bid in the property for the benefit of all the bondholders." In Chapman v. Jenkins & Tuttle, 270 III. 492, 499, where the provisions of the trust deed vested the exclusive right to sue on the bonds in the trustee or in a certain percentage of the bondholders in case of the trustee's failure to act, we held that it did not preclude the right of a bondholder to sue at law on the bond and that if the holder of bonds could not sue on them they would not be negotiable. The judgment was affirmed. 270 III. 507. But the Supreme court did not squarely pass on the question whether in such case the bonds would be non-negotiable. The court rested this conclusion upon a consideration of the provisions of the trust deed.

In Chicago Title & Trust Co. v. Larkin, 301 III. 388, it was held that a trustee may be authorized by the express provisions in the trust deed to bid for the trust property at a foreclosure sale, but where there was no such express provision, it duty was simply to sell the property to satisfy the debt.

In First Nat. Bank v. Grand Rapids Furniture Co., 305 III. 409, it was held that although the language of a trust deed (securing a large bond indebtedness on an apartment building) may be construed to authorize the trustee to bid at the foreclosure sale for all the bondholders, yet the trustee is vested with discretion, subject to the control of the chancellor, and that failure of the trustee to bid where it was doubtful whether such bid would benefit the bondholders was that a plan of reorganization submitted (the opinion) by a bondholders' protective committee, the chancellor did not err in refusing to require the trustee to bid.

In Strong v. Anderson, 328 III. 490, 494, the Third Division of this court held that in a foreclosure suit the court was without

jurisdiction to pass on a reorganization plan submitted by a bondholders' protective committee. This holding was reversed by the Supreme court, 366 Ill. 426, following the decision of the Supreme court in First Nat. Bank v. Bryn Mawr Building Corp., 365 Ill. 409, which affirmed the judgment of the Second Division of this court, 283 Ill. App. 267.

Plaintiff contends that the master and chancellor erred in not holding Straus & Co., the house of issue, liable for breach of duty as shown by the default in payment of the taxes and the monthly deposits; that there was further error in not finding the reorganization plan and sale were the result of a fraudulent deal designed to deprive both the depositing and non-depositing bondholders of the value of their securities, for the personal gain of the persons who acted in a trust capacity; that the sale was fraudulent per se and the redemption was void; that the trustee, the committee and the owner of the property combined to freeze out plaintiff by the fraudulent sale and were therefore liable to plaintiff for the true value of the property; that it was grossly inequitable to allow McLennan 10% of the stock in the new building corporation pursuant to the reorganization plan for the co-operation and conveyance of his equity of redemption. We think this latter contention cannot be sustained. Meyer et al. v. Kenmore Hotel Co., 297 U.S. 180; Himmel v. Straus, 286 Ill. App. 566; Chicago Title & Trust Co. v. Bertell, 297 Ill. App. 648. We have carefully considered the evidence in the record and the argument of counsel and are unable to say that the finding of the master, which was approved by the chancellor, is against the manifest weight of the evidence, and in these circumstances, we are not warranted, under the law, in disturbing the decree. Stasch v. Stasch, 355 Ill. 581; Pasedach v. Auw, 364 Ill. 491; Kosakowski v. Bagdon, 369 Ill. 282; Met. Life Ins. Co. v. Khattas, 299 Ill. App. 336; Lamis v. Hanson, 302 Ill. App. 404.

The Second Division of this court on February 28, 1949, in Allen v. Kahn, #40686, filed an opinion in a case where the facts are

jurisdiction to pass on a reorganization plan submitted by a bankruptcy protective committee. This holding was reversed by the Supreme Court, 322 U.S. 438, finding the decision of the District Court in First Nat. Bank v. Pure Oil Publishing Corp., 142 III. App. 479, affirmed the judgment of the Second District of this Court, 321 Ill. App. 267.

Plaintiff contends that the mortgage and chattel mortgage held in not holding Brown & Co., the house of issue, liable for breach of duty as shown by the default in payment of the issue and the monthly deposits; that there was further error in not finding the reorganization plan and sale were the result of a fraudulent deal designed to deprive both the depositing and non-depositing bondholders of the value of their security, for the personal gain of the persons who acted in a trust capacity; that the sale was fraudulent and in not the reorganization was void; that the trustee, the committee and the owner of the property combined to freeze out plaintiff by the fraudulent sale and were therefore liable to plaintiff for the true value of the property; that it was grossly inequitable to allow Coleman 12% of the stock in the new building corporation pursuant to the reorganization plan for the acquisition and conversion of his equity of redemption, to which this latter contention cannot be sustained. Mayer et al. v. Kenosha Total Co., 297 U.S. 180; Simons v. Cronin, 295 Ill. App. 588; Chicago Title & Trust Co. v. Kenyon, 297 Ill. App. 642. We have carefully considered the evidence in the record and the arguments of counsel and are unable to say that the finding of the master, which was approved by the chancellor, in regard to the monetary values of the assets, and in these circumstances, we are not convinced, under the law, in disturbing the decree. Ferrari v. Ferrari, 383 Ill. 493; Freeman v. Doe, 384 Ill. 483; Kaufmann v. Jackson, 388 Ill. 581; Nat. Life Ins. Co. v. Shafer, 390 Ill. App. 348; Ashby v. Jackson, 392 Ill. App. 404.

The decree herein of this court on February 23, 1943, in Kline v. Kline, Docket, first on digest is a mere stay the lower court

The decree herein of this court on February 23, 1943, in

to the same import as the facts in the instant case, and the arguments there made, substantially the same as the argument now made by plaintiff, where it was sought to impeach a foreclosure decree for fraud and restrain the execution of a reorganization plan and sale thereunder and where the relief sought was denied. On appeal the decree was affirmed. We agree with what the court said in that opinion and think it applicable to the facts in the case before us.

In the instant case, the foreclosure suit was filed April 21, 1932. A decree of foreclosure was entered October 21, 1932. About that time all the bondholders were notified of a proposed plan of reorganization. December 30, 1932, the property was sold under the foreclosure decree, and the report of sale and distribution approved February 21, 1933. Two days afterward, February 23, 1933, plaintiff filed his bill in the instant case. (More than four months after the foreclosure decree was entered and four months after plaintiff was notified of the plan of reorganization.) It was not until May 2, 1939, that plaintiff's objections to the master's report were disposed of, which was more than six years after the sale of the property under the foreclosure. In the meantime, a new corporation was organized, a mortgage of $56,000 placed on the property and the proceeds used to pay taxes. We think plaintiff showed a lack of diligence in failing to intervene in the foreclosure suit and there object to the sale, and if he was overruled, to the confirmation of it, and to the proposed plan of reorganization. He did nothing but stand by. We are also of opinion that after plaintiff brought the instant suit, there was a lack of diligence in prosecuting it. Under the facts disclosed by the evidence, we think it was plaintiff's duty not only to institute but to prosecute his suit diligently. People ex rel Richards v. Allman, 289 Ill. App.536. There seems to be no reason why a suit brought in February, 1933, should remain undisposed of for more than six years with no explanation in the record. What was said by Mr. Justice Reed in delivering the opinion of the Supreme court of the

in the same import as the facts in the instant case, and the judgments there made, substantially the same as the judgment now made by plaintiff, where it was sought to implead a Fraudulent Secure for Fraud and westerin the cancellation of a reorganization plan and with where-under and where the initial capital was denied. We adopt the decree as affirmed. We agree with that the court said in that opinion and think it applicable to the facts in the case before us.

In the instant case, the Foreclosure suit was filed April 21, 1926. A decree of foreclosure was entered October 21, 1926. Among the all the bondholders were notified of a proposed plan of reorganization. December 23, 1926, the property was sold under the foreclosure decree, and the account of sale and distribution approved February 21, 1927. The date affirmed, February 20, 1927, plaintiff filed his bill in the instant case. (Only than four months after the foreclosure decree was entered and four months after plaintiff was notified of the plan of reorganization.) It was not until May 9, 1929, that plaintiff's objections to the master's report were dispassed of, which was more than six years after the sale of the property under the foreclosure. In the meantime, a new corporation was organized, a mortgage of 1%,000 placed on the property and the property used to pay taxes. We think plaintiff showed a lack of diligence in failing to intervene in the foreclosure suit and take steps to the sale, and if he was overwhelmed, on the confirmation of it, and to the proposed plan of reorganization. He did nothing but stand by. He was also of opinion that other plaintiff brought the lawsuit suit, there was a lack of diligence in prosecuting it. Under the facts disclosed by the evidence, we think it was plaintiff's duty not only to exercise but to prosecute his suit diligently. Fonsie vs. Pal Schwarz v. Gilman, 108 Ill. App.588. There seems to be no reason why a suit brought in February, 1928, should remain unprosecuted for more than six years with no explanation in the record. When was suit by Pr. Partlow used to undermine the opinion of the Supreme Court of the

United States in Stoll v. Gottlieb, 305 U.S. 165, is appropriate here. "It is just as important that there should be a place to end as that there should be a place to begin litigation."

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

304 Ill. App.

40875

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error,

v.

AUGUST LOCKEFEER,
Plaintiff in error.

ERROR TO MUNICIPAL COURT, OF CHICAGO.

304 I.A. 586

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 18, 1939, an information was filed charging that January 14, 1939, August Lockefeer "unlawfully, intentionally and maliciously, did, then and there, drive and operate a certain motor vehicle" upon certain designated public streets in Chicago "with a willful and wanton disregard for the safety of persons *** causing death of Geo. Minnes," and injuring Casper Herzog "by driving bus car upon a sidewalk in violation of Section 48, M.A.R.T.," contrary to the statute. The case was postponed from time to time and May 4, 1939 defendant entered a plea of not guilty and waived a trial by jury. The case was then heard, the court found defendant guilty as charged in the information and May 18, judgment was entered on the finding and defendant sentenced to ten days in the county jail. Defendant prosecutes this writ of error.

The record discloses that defendant was a janitor and had been engaged in that business for nineteen years. He had been driving automobiles for about fourteen years. January 14, 1939, he was engaged as a janitor for a number of buildings and in doing his work drove his automobile from one building to another. About 12:30 o'clock P.M. on the day in question, he serviced a building at 5119 Belle Plaine avenue, an east and west street, located at 4100 north. After finishing his work at the building he started home in his automobile for dinner and drove about two blocks west to Long avenue, a north and south street, turned north in that street to Montrose avenue, an east and west street which is located at 4400 north. There was a "Stop"

304 I.A. 586

304 Ill. App.

No. 17,

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in error,

v.

ARTHUR LUCKENBILL,

Plaintiff in error.

ERROR TO

CRIMINAL COURT

OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 19, 1920, an information was filed charging that January 14, 1920, August Luckenbill "unlawfully, intentionally and maliciously, did, then and there, drive and operate a certain motor vehicle" upon certain designated public streets in Chicago "with a willful and wanton disregard for the safety of persons" causing death of Geo. Kinney," and injuring Gunner Barron "by driving his car upon a sidewalk in violation of Section 49, C.A.H.T.," contrary to the statute. The case was postponed from time to time and May 4, 1920 defendant entered a plea of not guilty and waived a trial by jury. The case was then heard, the court found defendant guilty as charged in the information and May 18, judgment was entered on the finding and defendant sentenced to ten days in the county jail. Defendant prosecutes this writ of error.

The record discloses that defendant was a janitor and had been employed in that business for nineteen years. He had been driving automobiles for about fourteen years. January 14, 1920, he was engaged as a janitor for a number of buildings and in doing his work drove his automobile from one building to another. About 12:30 o'clock P.M. on the day in question, he entered a building at 2137 Wabash Avenue, on east and west street, located at 4100 north. After finishing his work at the building he stored home in his automobile for dinner and drove about two blocks west to Long avenue, a north and south street, turned north in that street to Montrose avenue, an east and west street which is located at 4200 north. There was a "stop"

sign at Montrose avenue and defendant stopped his car at the south side of the avenue to permit eastbound traffic to pass. He then started into Montrose avenue intending to turn west to go to his home at 4325 N. McVickers avenue. When he was about half way across Montrose avenue he saw another automobile approaching behind him and he stopped his car to permit that car to pass north in Long avenue. He then started to make a left turn in Montrose avenue, the car suddenly went forward over the curb at the northwest corner of the street intersection, struck two boys, killing one of them, turned towards the south, struck a building in which the National Tea Company conducted a store, and ran southwest across Montrose avenue, struck a truck and stopped.

Defendant testified: "I stopped again, then I was already over the middle of Montrose avenue. As I started up again and was about four feet from the curb and there was ice there I started to make a left turn and heard a rumble and the car swung west and I turned the wheels and then I put on the brakes and it just flew around. I was excited and I stooped down to see the accelerator, it was stuck. I was all excited so I slid across the street, I swung around and hit the side of the store and hit the children.

"I was going about ten miles an hour when I made the left turn. The car was in first speed. I did not shift into any other speed after that. I continued in first speed from the time I went up on the sidewalk. The motor was racing." On cross examination he testified: "When the accelerator was stuck it was stuck all the way down to the floor board. I got my hands on it. I have been driving this automobile three months and this is the first time it stuck. I was bending down a second when the automobile was sliding across the street.

"The motor started to race as I was making the left turn. I did not try to make a left turn *** There was a spring broken. [which controlled the accelerator] I found that out when they towed the car in."

sign at Eastern avenue and Defendant stopped his car at the south side of the avenue to permit westbound traffic to pass. He then started into Montrose avenue intending to turn west to go to his home at 4221 S. Ashland avenue. When he was about half way across Montrose avenue he saw another automobile approaching behind him and he stopped his car to permit that car to pass south in long avenue. He then started to make a left turn in Montrose avenue, the car suddenly took fire and the wind in the northeast corner of the street intersection, about ten feet, striking one of them, turned towards the south, struck a building which the National Tea Company occupied a store, and was completely engulfed in flames, struck a tree and stopped.

Defendant testified: "I stopped again, then I was already over the middle of Montrose avenue. So I started up again and was about four feet from the curb and then was the time I started to make a left turn and heard a rumble and the car swung west and I turned the wheels and then I put on the brakes and it just flew around. I was excited and I stepped down to see the accelerator, it was stuck. I was all excited so I did answer the street, I swung around and hit the side of the street and hit the building.

"I was going about ten miles an hour when I made the left turn. The car was in first speed. I did not shift into any other speed after that. I continued in first speed from the time I went up on the sidewalk. The motor was racing." On cross examination he testified: "When the accelerator was stuck it was about all the way down in the floor board. I got my hands on it. I have been driving this automobile three weeks and this is the first time it stuck. I was leaning down a second when the automobile was sitting across the street.

"The motor started to race as I was moving to left turn. I did not try to make a left turn ---" There was a spring broken. Counsel modified the cross-examiner) I found that out when they towed the car in."

Noel Gibbons, called by defendant, testified that he had been a mechanic for fifteen years in repairing automobiles and was employed by Butler Brothers; that he examined defendant's car on the day after the accident when it was in the shop for repairs. "In regard to the accelerator, I found the spring broken, no way for the throttle to stay closed. *** The spring keeps the accelerator up. *** When the spring is broken the accelerator falls down and the motor is open."

Witnesses called by The People gave testimony as to the movements of the car, substantially the same as defendant testified. And there is no evidence to the contrary. One of them testified: "I heard the car make a funny sound. *** it went burr-r-r." Two police officers called by The People testified they received a report of the accident shortly after it occurred. One of them testified: "I got a report of the accident shortly after. I didn't know Officer Minnes [the father of the boy who was killed] personally. *** I only had occasion *** to get in touch with his station, some months before the accident;" that he examined defendant's automobile at the time, asked defendant about the accident "and he said the accelerator stuck;" that the witness and another officer looked at the car; that it was locked; that they went into the store near where the car was at the time "and got a coat hanger and lifted up the handle of the door and examined the foot accelerator, and it did not stick." This was about fifteen or twenty minutes after the accident. The other officer gave testimony substantially to the same effect. He also testified that defendant, at the time, was perfectly sober and apparently there was nothing wrong with him. This is substantially all of the evidence in the record.

Section 48, chap. 95-1/2, p. 2148, Ill. Rev. Stats. 1939, which is the basis for the information, provides: "Any person who drives any vehicle with a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving," and provides punishment for such offense. The information charged that defendant

Noel Gibson, called by defendant, testified that he had been a mechanic for fifteen years in repairing automobiles and was employed by Butler Brothers; that he examined defendant's car on the day after the accident when it was in the shop for repairs. "In regard to the accelerator, I found the spring broken, so say for the throttle to stay closed. *** The spring keeps the accelerator up. *** When the spring is broken the accelerator falls down and the motor is open."

Witnesses called by the People gave testimony as to the movements of the car, substantially the same as defendant testified. And there is no evidence to the contrary. One of them testified: "I heard the car make a funny sound. *** It went bum-r-r-." Two police officers called by The People testified they received a report of the accident shortly after it occurred. One of them testified: "I got a report of the accident shortly after. I didn't know (Illegible) (the truth of the by who was killed) personally. *** I only had conversations *** to get in touch with his relatives, some weeks before the accident;" that he received defendant's statement at the time, which defendant about the accident "and he said the accelerator stuck;" that the witness and another officer looked at the car; that it was locked; that they went into the store near where the car was at the time "and put a gold badge and lighted up the inside of the door and released the foot accelerator, and it did not stick." This was about fifteen or twenty minutes after the accident. The other officer gave testimony substantially to the same effect. He also testified that defendant, at the time, was particularly sober and apparently there was nothing wrong with him. This is substantially all of the evidence in the record.

Section 49, chap. 95-1/2, p. 2149, Vol. Nov. Stats. 1929, which is the basis for the information, provides: "Any person who drives any vehicle with a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving," and provides punishment for such offense. The information charges that defendant

"unlawfully, intentionally and maliciously" drove his automobile with willful and wanton disregard for the safety of persons.

It is obvious there is no evidence that would sustain this charge - not a word of evidence is in the record, viewed in any light, that tends to show that defendant intentionally or with wanton disregard for the safety of persons drove his automobile at the time complained of. On the contrary, the evidence is all to the effect that something went wrong with the accelerator and the car dashed forward running over the curb, striking a tree and the children, a building and a truck before it stopped. It was being driven slowly at the time the spring which was connected with the accelerator broke.

The accident was a most unfortunate one, but finding the defendant guilty of the charge, and sentencing him to the county jail, are wholly unwarranted. The judgment of the Municipal court of Chicago is reversed.

REVERSED.

Matchett, P.J., and McSurely, J., concur.

"malevolently, intentionally and maliciously" drove his automobile with willful and wanton disregard for the safety of persons.

It is obvious there is no evidence that would sustain this charge - not a word of evidence is in the record, viewed in any light, that tends to show that defendant intentionally or with wanton disregard for the safety of persons drove his automobile as the complainant of. On the contrary, the evidence is all to the effect that something went wrong with the accelerator and the car darted forward running over the curb, striking a tree and the children, a building and a tree before it stopped. It was being driven slowly at the time the young man was wrestling with the accelerator brake.

The accident was a most unfortunate one, but finding the mathematic guilt of the charge, and sentencing the to the county jail, are wholly unwarranted. The judgment of the municipal court of Chicago is reversed.

REVERSED.

McGOOEY, P.J., and Matchett, J., concur.

304 Ill. App.

40884

DOROTHY GOODMAN, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
MELVIN GOODMAN, Appellee.	)	COOK COUNTY.

304 I.A. 587

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 9, 1938, plaintiff brought suit against defendant for a divorce charging him with extreme and repeated cruelty. The parties were married August 1, 1937, and lived together until March 14, 1938, when defendant left and they have not lived together since. There was no issue of the marriage. May 12, plaintiff filed a petition for temporary alimony and solicitor's fees in which she set up that the parties jointly possessed $400. She demanded that he give her $200 of the money. She further set up that he was an able-bodied man and earning a salary of about $45 a week. She prayed for the $200, reasonable solicitor's fees and alimony. On the same day, May 12, defendant filed his answer to the complaint and petition denying the charges of cruelty and denied the separation was on account of his conduct. He also denied he was receiving $45 per week "or any sum near that amount." He made no denial in reference to the $400 but averred that plaintiff was a healthy young woman, capable of supporting herself; that she was employed, earning approximately $20 a week and that no temporary alimony or solicitor's fees should be allowed pending the suit. On the same day, plaintiff's petition and defendant's answer to the complaint and petition came on for hearing and the order was entered that the defendant pay $2.50 per week as temporary alimony, and all other matters were reserved until the hearing of the cause.

January 24, 1939, the cause was heard before the chancellor, both parties being present and represented by counsel, and after hearing the evidence the court announced he would grant plaintiff a

[illegible]

[illegible]

[illegible]

divorce and the right to resume her maiden name, but no alimony or solicitor's fees or any part of the $400 would be allowed. Apparently, the court directed that a decree be prepared and on February 2, following, the parties appeared and counsel for plaintiff moved the court to dismiss the cause. The motion was denied and plaintiff appeals.

In her notice of appeal plaintiff prays that that part of the decree by which she was denied alimony and solicitor's fees, and a division of the $400, be reversed and the cause remanded for further proceedings to determine the proper amount of alimony and solicitor's fees to be awarded and the amount due to plaintiff as her share of the $400, or in the alternative that the entire decree be reversed and the cause remanded with directions to sustain plaintiff's motion and dismiss the cause. In this court the only argument made by plaintiff is that she should have been awarded one-half of the $400, alimony and solicitor's fees.

Defendant's position, as stated by his counsel is that "The record is bare of any evidence tending to show the financial situation of the defendant whatsoever," and that the matter of allowance of alimony, solicitor's fees and division of property was solely a question within the discretion of the trial court.

We are unable to agree with this contention. Plaintiff testified: "I had joint money with the defendant of $400 derived from wedding gifts which was banked by the defendant and which he still has." We think the evidence shows she had no property or means of her own and only worked occasionally on Saturdays. Before she was married she earned $15 a week.

We think the court should have allowed plaintiff one-half of the $400 and reasonable solicitor's fees, and upon a consideration of the record we are of opinion the court should have awarded $75 for solicitor's fees which is a very modest allowance for the services performed by the solicitor up to and including the entry of the decree. We are also of opinion that plaintiff should have been

divorce and the right to resume her maiden name, but no alimony or solicitor's fees or any part of the $400 would be allowed. Apparently, the court directed that a decree be prepared and on February 2, following, the parties appeared and counsel for plaintiff moved the court to dismiss the cause. The motion was denied and plaintiff appealed.

In her notice of appeal plaintiff prays that that part of the decree by which she was denied alimony and solicitor's fee, and a division of the $400, be reversed and the cause remanded for further proceedings to determine the proper amount of alimony and solicitor's fee to be awarded and the amount due to plaintiff as her share of the $400, or in the alternative that the entire decree be reversed and the cause remanded with directions to sustain plaintiff's motion and dismiss the cause. In this court the only argument made by plaintiff is that she should have awarded one-half of the $400, alimony and solicitor's fees.

Defendant's position, as stated by his counsel is that "The record is bare of any evidence tending to show the financial abilities of the defendant whatsoever," and that the matter of allowance of alimony, solicitor's fees and division of property was solely a question within the discretion of the trial court.

We are unable to agree with this contention. Plaintiff testified: "I had joint money with the defendant of $400 derived from wedding gifts which was banked by the defendant and which he still has." We think the evidence shows she had no property or means of her own and only worked occasionally on Saturday. Before she was married she earned $18 a week.

We think the court should have allowed plaintiff one-half of the $400 and reasonable solicitor's fees, and upon a consideration of the record we are of opinion the court should have awarded $75 for solicitor's fees which is a very modest allowance for the services performed by the solicitor up to and including the entry of the decree. We are also of opinion that plaintiff should have been

awarded a reasonable sum for alimony, but the evidence in the record is wholly insufficient for us to pass on this question.

The decree, in so far as it failed to allow plaintiff one-half of the $400, solicitors fees and alimony is reversed and the cause remanded for further proceedings not inconsistent with the views stated in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P.J., and McSurely, J., concur.

awarded a reasonable sum for alimony, but the evidence in the record is wholly insufficient for us to pass on this question.

The decree, in so far as it failed to allow plaintiff one-half of the fund, minimizes less and alimony is reversed and the cause remanded for further proceedings not inconsistent with the views stated in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Patchett, C.J., and Kennedy, J., concur.

304 ILL. App.

40893

M. F. UNGER,
Appellee,

v.

DR. HARTNACK EXTERMINATING SERVICE, INC., a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

304 I.A. 587

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover $75 claimed to be due him for attorney's fees under the terms of a written contract entered into between the parties. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that defendant was engaged in business and William Block was employed by it. He had complete access to all of defendant's files, customer lists, price lists, etc., and supervised defendant's office in the absence of Dr. Hartnack, the president. In the latter part of February, 1938, Block left his employment to become an officer of the American Laboratories, Inc., a competitor of defendant and there is some evidence to the effect that after Block was employed by the second company he called on and solicited some of his former employer's customers. In an endeavor to have this stopped, Dr. Hartnack on or about October 5, 1938, went to see plaintiff, a practicing attorney, for legal assistance and at that time plaintiff and defendant entered into the following written contract:

"I Hereby Agree To represent the Dr. Hartnack Exterminating Service, Inc., in its claim against the American Laboratories, Inc., and William Block, based upon the solicitation and servicing of the Dr. Hartnack accounts.

"I Further Agree to charge no more than Twenty Five Dollars ($25) for legal services rendered in the event that I am unable to immediately restrain the said Block and American Laboratories, Inc., from such solicitation and servicing of any of Dr. Hartnack's accounts.

"In The Event that I am successful in the said restraining of the said Block and American Laboratories, Inc., from such solicit-

82. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover its claimed to be due him for attorney's fees under the terms of a written contract entered into between the parties. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that defendant was engaged in business and William Block was employed by it. He had complete access to all of defendant's files, customer lists, price lists, etc., and supervised defendant's office in the absence of Dr. Hartnack, the president. In the latter part of February, 1958, Block left his employment to become an officer of the American Laboratories, Inc., a competitor of defendant and there is some evidence in the record that after Block was employed by the second company he called on and solicited some of his former employer's customers. In an endeavor to have this stopped, Dr. Hartnack on or about October 6, 1958, went to see plaintiff, a practicing attorney, for legal assistance and at that time plaintiff and defendant entered into the following written contract:

"I hereby agree to represent the Dr. Hartnack Veterinarian Service, Inc., in its claim against the American Laboratories, Inc., and William Block, based upon the solicitation and enticing of the Dr. Hartnack accounts.

"I further agree to charge no more than Twenty Five Dollars ($25) for legal services rendered in the event that I am unable to immediately prevent the said Block and American Laboratories, Inc., from such solicitation and enticing of any of Dr. Hartnack's accounts.

"In the event that I am successful in the said restraining of the said Block and American Laboratories, Inc., from such solicit-

ing, or servicing of said accounts, my fees for said service will be One Hundred Dollars ($100) which the said Dr. Hartnack Hereby Agrees to pay.

"It Is Understood that there will be no additional expenses whatsoever, charged to Dr. Hartnack, regardless of results."

Shortly after the execution of the agreement plaintiff apparently arranged for and had a number of meetings with an Assistant State's Attorney in the State's Attorney's office at which plaintiff, Dr. Hartnack, Block and some others appeared on two or three occasions. And the record tends to show that plaintiff was seeking to have Block indicted and prosecuted for his solicitation and servicing of the former customers of defendant company under the provisions of sec. 179a and 179b (404a, 404b), chap. 38, Ill. Rev. Stats. 1939. The substance of these sections is that it is made a criminal offense for any person without the consent of the lawful owner to have any lists or other collection of names of customers or subscribers (not less than 100 in number) in his possession or to make use of them to his own advantage, and a penalty is provided for the violation of the statute. After two or three meetings with the Assistant State's Attorney, the latter advised that there was no case for criminal prosecution against Block. There is evidence to the effect that at these meetings and at the meeting in plaintiff's law office, Block agreed not to solicit further any of defendant's former customers although this is not at all clear; nor is the evidence clear that Block did desist from such solicitation and servicing of the former customers of defendant.

Counsel for defendant argues that by the written contract entered into, plaintiff agreed to secure the indictment of Block by the Grand Jury of Cook county or to "immediately restrain" Block by injunction or other legal proceeding from further interfering with defendant's business.

On the other side, the position of counsel for plaintiff is that the contract did not provide that plaintiff was to have Block indicted under the statute and prosecuted, nor was he required to

law, or servicing of said accounts, my fees for said service will be the Internal Revenue (sic) added the said Dr. Harrison Barsky agree to pay.

"It is Understood that there will be no additional expense whatsoever, charged to Dr. Harrison, regardless of results."

Shortly after the execution of the agreement plaintiff apparently arranged for and had a number of meetings with an insistent there's Attorney in the Tax's Attorney's office at which plaintiff, Dr. Harrison, Blank and some others appeared as the or there occasions. And the record tends to show that plaintiff was seeking to have Blank indicted and prosecuted for his solicitation and servicing of the former mainmary of delinquent employ under the provisions of sec. 1[illegible] and 1[illegible] ([illegible], [illegible]), [illegible], Sa, 111, Sev, [illegible], [illegible]. The substance of these sections is that it is made a criminal offense for any person without the consent of the Joint Agent to have any lists or other collection of names or authorize or advertisers (not less than 100 in number) in his possession or to make use of them to his own advantage, and a penalty is provided for the violation of the statute. After two or three meetings with the Assistant Tax's Attorney, the latter advised that there was no case for criminal prosecution against Blank. There is evidence to the effect that at these meetings and at the meeting in plaintiff's law office, Blank agreed not to solicit further any of defendant's former customers although this is not at all clear; nor is the evidence clear that Blank did desist from such solicitation and servicing of the former customers of defendant.

Counsel for defendant argues that by the written contract entered into, plaintiff agreed to secure the indictment of Blank by the Grand Jury of Cook county or to "immediately restrain" Blank by injunction or other legal proceeding from further interfering with defendant's business.

On the other side, the position of counsel for plaintiff is that the contract did not provide that plaintiff was to have Blank indicted under the statute and prosecuted, nor was he required to

secure an order of court to restrain Block from soliciting or servicing the former customers of defendant; that plaintiff's only duty under the contract "was to stop the solicitation and servicing of defendant's accounts by whatever means plaintiff devised."

There is no specific provision in the written contract that would require plaintiff to secure an indictment against Block, nor is it specifically provided that Block should be restrained by an order of court. But we think the construction placed upon the contract by plaintiff, as evidenced by what he did, shows he put the construction on the contract contended for by defendant. But whatever view is taken, we think it does not sufficiently appear from the record that Block desisted from doing the things complained of by defendant.

Moreover, Block could not be enjoined for the reason the evidence fails to show that Block was doing anything illegal. Amer. Cleaners and Dyers v. Foreman, 252 Ill. App. 122. In that case we held in the absence of an express contract, equity would not enjoin an employee from soliciting business from the former employer's customers whom he had served where no list of names was taken and where there was no fraud committed by the solicitation for the new employer. See also Messenger Pub. Co. v. Mokstad, 257 Ill. App. 161. There is no evidence nor is there any contention that Block took any list of names of customers when he left defendant's employ.

For the reasons stated, the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Matchett, P.J., and McSurely, J., concur.

secure an order of court to restrain Block from soliciting or servicing the former customers of defendant that plaintiff's only duty under the contract was to stop the solicitation and servicing of defendant's accounts by reason of defendant's breach.

There is no specific provision in the written contract that would require plaintiff to secure an injunction against Block, nor is it specifically provided that Block should be restrained by an order of court. Nor do facts the stipulation place upon the shoulders of plaintiff, as evidenced by what he did, where he put the construction on the contract contended for by defendant. But whatever view is taken, we think it does not sufficiently appear from the record that Block desisted from doing the things complained of by defendant.

However, Block could not be expected to the extent the evidence fails to show that Block was doing anything illegal. Kemp, Blandon and Tyre v. Thomas, 287 Ill. App. 180. In that case as held in the absence of an express contract, equity would not enjoin an employee from soliciting business from the former employer's customers when he had never where no list of names was taken but where there was no fraud committed by the solicitation for the new employer. See also Beaconsfield Pub. Co. v. Kobland, 287 Ill. App. 181. There is no evidence nor is there any contention that Block took any list of names of customers when he left defendant's employ.

For the reasons stated, the judgment of the municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McGlynn, P.J., and Matchett, J., concur.

304 Ill. App.

40904

DOROTHY RUSSELL,
Appellee,

v.

FRANCES MERLE LONG WHITE,
Individually and as Administratrix
with the Will Annexed of the Estate
of Carl M. White, Deceased,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

304 I.A. 588

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint in chancery to vacate and set aside the judgment of the Probate court of Cook county admitting to probate the oral or nuncupative will of Carl White, deceased, and that such claimed will be declared null and void. The bill alleged a number of grounds why the claimed will was invalid but on the morning of the trial plaintiff eliminated all but one which was that the will did not comply with the provisions of sec. 15 [17], of the Statute of Wills, sec. 15 [17], chap. 148, Ill. Rev. Stats. 1939. Defendant filed her answer and March 24, 1939, the jury returned a verdict that the purported will was not the last will and testament of Carl M. White, deceased. Three days later, the court entered a decree in conformity with the verdict of the jury and defendant appeals.

The record discloses that Carl M. White, for many years lived with Frances Merle Long and some time in 1936, executed a written will. September, 1937, he married Frances Merle Long and December 7, 1937, died. It is the contention of defendant that seven days before his death, viz., November 30, 1937, Mr. White had a talk with Mr. and Mrs. Van Hamlin, who were visiting him at his home in Chicago and that he then made an oral will which on December 14, 1937, was reduced to writing signed by Mr. and Mrs. Van Hamlin and by May V. Hammond and Vernon I. O. Fick.

Mrs. Van Hamlin testified that about 3:30 o'clock on the afternoon of November 30, 1937, she and her husband were visiting Mr.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint in chancery to vacate and set aside the judgment of the Probate court of Cook county admitting to probate the said an instrument will of Carl Ahlm, deceased, and that such claimed will be declared null and void. The bill alleged a number of grounds and the claimed will was invalid but on the morning of the trial plaintiff dismissed all but one which was that the will did not comply with the provisions of sec. 1b [127], of the "Statute of Wills, sec. 1a [126], chap. 148, Ill. Rev. Stats. 1927." Defendant filed her answer and March 24, 1928, the jury returned a verdict that the purported will was not the last will and testament of Carl H. Ahlm, deceased. Three days later, the court entered a decree in conformity with the verdict of the jury and defendant appeals.

The record discloses that Carl H. Ahlm, for many years lived with Frances Korpik long and some time in 1926, executed a written will. September, 1927, he married Frances Korpik and December 7, 1927, died. It is the contention of defendant that seven days before his death, viz., November 30, 1927, Mr. Ahlm had a talk with Mr. and Mrs. Van Haelin, who were visiting him at his home in Chicago and that he then made an oral will which on December 14, 1927, was reduced to writing signed by Mr. and Mrs. Van Haelin and by Mr. V. Hanson and Vernon I. O. Fick.

Mrs. Van Haelin testified that about 8:30 o'clock on the afternoon of November 30, 1927, she and her husband were visiting Mr.

White in his bedroom at his home in Chicago and at that time he said: "I am dying by inches, *** I want to know that Merle [Mrs. White] will be taken care of. *** I want her to have everything in this world I own, except $500 I want to go to Dorothy, my daughter. *** I want Mabel [Mrs. Van Hamlin] to please be a witness to this. *** I want my will carried out to a letter." On cross-examination she testified that at the time of the conversation Mr. White had spoken about a will he had already made; that she told him she had seen a piece in the Tribune where it was said that a will was no good if a man married after he made the will. Thereupon Mr. White asked her to telephone Russell Clark, his attorney; that she called him and told him she was calling for Mr. White and wanted to know if a will which had been made before a man married was rescinded by his marriage and that Mr. Clark told her under such circumstances the will would be perfectly good.

Mr. Van Hamlin testified as to the same conversation and his testimony is substantially the same as that of his wife. Vernon Fick, who signed the will after it was written on December 14, testified that he saw Mr. and Mrs. Van Hamlin sign the will and that he signed it. May Hammond also testified she signed the will and that it was signed by the other three persons. Russell Clark testified that he was a practicing lawyer and had followed that profession for fifty years and had known Mr. Clark for twenty-five years; that neither on November 30, 1937, nor at any time during the months of November or December had he had a conversation with Mrs. Van Hamlin.

The foregoing testimony was given on the hearing by the witnesses in the Probate court and was read on the trial in the Circuit court. In addition to this evidence, Charles Parrish, Harry Long, Frances White, Donald Seeley and William Lund testified on the trial of the cause in the Circuit court. Parrish testified he had known Carl White for twenty years and was in the Probate court on the hearing in that court; that Mr. Seeley, attorney for defendant at that time, in response to a question put to him by the Probate judge, said it was agreed there was no will in the case; that he further testified

White in his bedroom at his home in Chicago, and at that time he said: "I am dying by inches, *** I want to know that Arie [Mrs. White] will be taken care of. *** I want her to have everything in this world I own, except $500 I want to go to Dorothy, my daughter. *** I want Rachel Carr, the feminist to please be a witness to this. *** I want my will carried out to a letter." On cross-examination she testified that at the time of the conversation Mr. White had spoken about a will he had already made; that she told him she had seen a piece in the Chicago Tribune where it was said that a will was no good if a man married after he made the will. Thereupon Mr. White asked her to telephone Russell Clark, his attorney; that she called him and told him she was calling for Mr. White and wanted to know if a will which had been made before a man married was revoked by his marriage and that Mr. Clark told her under such circumstances the will would be perfectly good.

Mr. Van Buskin testified as to the same conversation and his testimony is substantially the same as that of his wife. Thomas Fick, who signed the will after it was written on December 14, testified that he saw Mr. and Mrs. Van Buskin sign the will and that he signed it. Ray Hammond also testified she signed the will and that it was signed by the other three persons. Russell Clark testified that he was a practicing lawyer and had followed that profession for fifty years and had known Mr. Clark for twenty-five years; that neither on November 30, 1927, nor at any time during the months of November or December had he had a conversation with Mrs. Van Buskin.

The foregoing testimony was given on the hearing, by the witnesses in the Probate court and was read on the trial in the Circuit court. In addition to this evidence, Charles Fowler, Tony Long, Frances White, Lucile Seeley and William Lund testified on the trial of the cause in the Circuit court. Patrick testified he had known Carl White for twenty years and was in the Probate court on the morning in that month; that Mr. Healy, attorney for defendant at that time; in response to a question put to him by the Probate Judge, said it was agreed there was no will in the case; that he further testified

he had a conversation with Mrs. White in the middle of December, 1937, she having called to see him on some business matter. Among other things, she told him that Russell Clark had nothing to do with the probating of the estate and that he had "left her in a bad mess about not having Mr. White make out a will after she married him." Harry Long testified he knew Mr. White about twelve years; lived at his home as a son; that he knew the Van Hamlins; that he saw them at Mr. White's home November 30, 1937, in Mr. White's room; that he again saw Mrs. Hamlin a couple of days later and heard a conversation between Merle (Mrs. White) and Mrs. Van Hamlin in Mrs. White's room. "Merle asked Mrs. Van Hamlin about Carl making a will. Mrs. Van Hamlin said she could not get Carl White to make a will without Mr. Russell Clark to do it." On cross-examination he testified he had not talked to anybody about the case. "I just talked to Mr. Lund about the case." The witness further testified he lived with Mr. White, never paid any board but did errands; that there was no telephone in Mr. White's room the last few months of his life.

Mrs. Van Hamlin was then called and testified substantially the same as the testimony she gave before the Probate court hereinbefore referred to. She further testified about the visit. "I arrived about 2:00 o'clock. I saw Mrs. White. I also saw Harry Long. Harry Long was not there on November 30th. I did not see him." Mr. Fick was then called and he testified as to the signing of the will, above discussed; that a document was prepared by Mr. Seeley who typed it - it was then signed. May Hammond also testified as to her signing of the will. Mr. Van Hamlin was then called and gave substantially the same testimony as that given by him in the Probate court, which we have above discussed.

Defendant, Frances White, testified that she knew Harry Long and he was not at her home on December 2, as he testified and she did not say at that time that she could not get Carl to make a new will without Russell Clark doing it and she did not, at that time, say that Russell Clark had no interest in the matter. Donald Seeley testified

he had a conversation with her. While in the middle of speaking, Mrs. Hurley called to see him on some business matter. Among other things, she told him that Russell Clark had nothing to do with the production of the artwork and that he had Pat's boy in a bad mood about not having Mr. White make out a will after she married him." Harry long testified he knew Mr. White about twelve years; lived at his home as a son; that he knew the Van Hamlins; that he was there at Mr. White's home November 30, 1927, in Mr. White's room; that he again saw Mrs. Hamlin a couple of days later and heard a conversation between Merle (Mrs. White) and Mrs. Van Hamlin in Mr. White's room. "Merle asked Mrs. Van Hamlin about Carl making a will. Mrs. Van Hamlin said she could not get Carl White to make a will without Mr. Russell Clark to do it." On cross-examination he testified he had not talked to anybody about the case. "I just talked to Mr. Lund about the case." The witness further testified he lived with Mr. White, never paid any board but did errands; that there was no telephone in Mr. White's room the last few months of his life.

Mrs. Van Hamlin was then called and testified substantially the same as the testimony she gave before the Probate court herein-before referred to. The further testified about the visit. "I arrived about 2:00 o'clock. I saw Mr. White. I also saw Harry Long. Harry Long was not there on November 30th. I did not see him." Mr. Pat was then called and he testified as to the signing of the will, above discussed; that a document was prepared by Mr. Healy; she typed it - it was then signed. Mr. Hammond also testified as to her signing of the will. Mr. Van Hamlin was then called and gave substantially the same testimony as that given by him in the Probate court, which we have above discussed.

Defendant, Frances White, testified that she knew Harry Long and he was not at her home on December 3, as he testified and she did not say at that time that she would get Carl to make a new will without Russell Clark doing it and she did not, at that time, say that Russell Clark had no interest in the matter. Donald Healy testified

that on the hearing in the Probate court, in response to a question of Judge O'Connell, he replied that it was agreed there was no written will. William Lund testified that he had known Mr. White very well for about seventeen years; had been in business with him and that during October and November, 1937, there was no telephone in Mr. White's room and he was there about December 2 and there was no telephone then in the room. The nearest one was about 12 feet away. This is substantially all the evidence in the record.

Counsel for defendant contends that the motion he made on behalf of defendant for a judgment notwithstanding the verdict, should have been sustained by the trial court. We think this contention cannot be sustained. There was evidence from which the jury might believe that White did not intend to make a will on November 30, 1937. In these circumstances, obviously, the court did not err in overruling the motion.

Counsel for defendant also says in stating his theory of the case, "the complaint, shorn of all its allegations except the due execution of the will, amounted to a direct appeal from the Probate Court to the Circuit Court, and the proponent of the will is the only one who could take an appeal and then only when the will had been denied probate by the Probate Court." We are unable to follow this contention. There was no appeal taken from the Probate court but a complaint was filed in chancery to set aside the probate of the will and to declare it invalid.

Upon a consideration of all the evidence, we are clearly of the opinion that the question was one for the jury and we are unable to say that the finding of the jury is against the manifest weight of the evidence.

The decree of the Circuit court of Cook county entered in accordance with the verdict of the jury is affirmed.

DECREE AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

that on the hearing in the Probate court, in response to a question of Judge S'Donnell, he replied that if was signed that he written will. William Lund testified that he had known Mr. Smith very well for about seventeen years; had been in business with him and that during October and November, 1927, there was no telephone in Mr. Smith's room and he was there about December 2 and there was no telephone then in the room. The nearest one was about 12 feet away. This is substantially all the evidence in the record.

Counsel for defendant contends that the motion to make on behalf of defendant for a judgment notwithstanding the verdict, should have been sustained by the trial court. We think this contention cannot be maintained. There was evidence from which the jury might believe that Smith did not intend to make a will on November 30, 1927. In these circumstances, obviously, the court did not err in overruling the motion.

Counsel for defendants also argue in stating his theory of the case, "The contestant, there at all the allegations except the execution of the will, amounted to a direct appeal from the Probate Court to the Circuit Court, and the proponent of the will is the only one who could take an appeal and then only when the will had been denied probate by the Probate Court." We see nothing to follow this contention. There was no appeal taken from the Probate Court but a duplicate was filed in chancery to set aside the probate of the will and to declare it invalid.

Upon a consideration of all the evidence, we are clearly of the opinion that the question was one for the jury and we are unable to say that the finding of the jury is against the manifest weight of the evidence.

The decree of the Circuit court of Cook county entered in accordance with the verdict of the jury is affirmed.

AFFIRMED.

McSURLY, P.J., and McBRIDE, J., concur.

304 Ill. App.

40960

JEANETTE EDWIN,
Appellee,

vs.

ARTHUR C. EDWIN.

CLARENCE W. SHAVER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

304 I.A. 588

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Clarence W. Shaver seeks to reverse an order entered by the Superior court of Cook county adjudging him guilty of contempt in failing to pay $50 to Jeanette Edwin, and committing him to the common jail of Cook county for a period not to exceed six months unless he should sooner pay the $50.

The record discloses that Shaver is a practicing attorney and represented Jeanette Edwin in her suit for divorce against her husband, Edwin. June 19, 1937, a decree was entered in the suit which recited that by stipulation of the parties, the cause was heard as a default matter, the marriage was dissolved and the court found that plaintiff and her husband, the defendant, were indebted to Dr. Clifford Bullen for $310 for professional services rendered by him to plaintiff; that plaintiff and defendant owed a hospital bill of $78 which was incurred as a result of an operation performed by Dr. Bullen on plaintiff, and defendant was decreed to pay to plaintiff $125 for her solicitor's fees. It was decreed that these items be paid by defendant in lieu of alimony, dower and of all of her claims. Afterward plaintiff by her solicitor, Shaver, filed her verified petition in the divorce suit in which she set up the provision of the divorce decree with reference to the doctor and hospital bills; that they were unpaid and prayed that a judgment be entered for the sum of the two items in favor of plaintiff and against defendant. On the same day an order was entered in which it was decreed that a judgment be

Appellant.

CLARENCE C. SCHAIR,

Appellee.

Appeal from
Circuit Court
Cook County.

Mr. Justice O'Connor delivered the opinion of the court.

By this appeal Clarence C. Shaver seeks to reverse an order entered by the Superior court of Cook county adjudging his guilty of contempt in failing to pay $80 to Jeanette Kahn, and committing him to the common jail of Cook county for a period not to exceed six months unless he should sooner pay the $80.

The record discloses that Shaver is a practicing attorney and represented Jeanette Kahn in her suit for divorce against her husband, Chris. June 16, 1927, a decree was entered in the suit which recited that by stipulation of the parties, the cause was heard as a default matter, the marriage was dissolved and the court found that plaintiff and her husband, the defendant, were indebted to Mr. Clifford Bullen for $210 for professional services rendered by him to plaintiff: that plaintiff and defendant owed a hospital bill of $75 which was incurred as a result of an operation performed by Dr. Bullen on plaintiff, and defendant was decreed to pay to plaintiff $125 for her solicitor's fees. It was decreed that these items be paid by defendant in lieu of alimony, dower and of all of her claims. Afterward plaintiff by her solicitor, Shaver, filed her verified petition in the divorce suit in which she set up the provision of the divorce decree with reference to the doctor and hospital bills: that they were unpaid and prayed that a judgment be entered for the sum of the two items in favor of plaintiff and against defendant. In the same day an order was entered in which it was decreed that a judgment by

entered in favor of Jeanette Edwin, plaintiff, against her former husband, Arthur C. Edwin for $388, being the amount of the doctor and hospital bills. Garnishment proceedings were filed in the suit by Mr. Shaver and interrogatories filed, and apparently an agreement was entered into between Shaver and the garnishee whereby payments were to be made by the garnishee or defendant in the divorce suit, the payments to be made direct to Shaver, apparently in accordance with an agreement made between him and his client, Mrs. Edwin. Thereafter from time to time payments were made to him.

November 21, 1938, an order was entered on motion of plaintiff which recites that upon her verified petition for an order on Shaver to turn over $50 to her, which he had collected from her former husband, it was ordered that the matter be referred to a special commissioner for hearing. The petition filed by Mrs. Edwin is not in the record before us. Shaver filed his answer to the petition, which is in the record, from which it appears that he was claiming the $50 in payment of services he had rendered in endeavoring to collect the amounts due under that decree from plaintiff's former husband. The special commissioner made a report in which he refers to the divorce decree and the three items to be paid by defendant in the divorce suit, viz., the doctor's bill, $310, the hospital bill, $78, and solicitor's fees, $125, and finds that Arthur C. Edwin, defendant in the divorce suit, paid to Shaver $359; that Shaver had distributed that amount by retaining $125 for his fees; paid $158.50 to Dr. Bullen; $15 on account of the hospital bill; $10 court costs, and that he retained the $50 which he refused to turn over to Mrs. Edwin. The commissioner recites that Shaver testified before him as to what he had done in endeavoring to collect the money due under the divorce decree; that he had collected the $359 and made disbursements as above stated. The commissioner found that Shaver had no understanding with his client that he would charge her an additional fee for his services in endeavoring to collect the money; that he could have cited defendant in the divorce suit for non-payment, and could have

entered in favor of Jeanette Edwin, plaintiff, against her former husband, Arthur G. Edwin for $250, being the amount of the doctor and hospital bills. Garnishment proceedings were filed in the suit by Mr. Shaver and interrogatories filed, and apparently an agreement was entered into between Shaver and the garnishee whereby payments were to be made by the garnishee or defendant in the divorce suit, the payments to be made direct to Shaver, apparently in accordance with an agreement made between him and his client, Mrs. Edwin. Thereafter from time to time payments were made to him.

November 21, 1938, an order was entered on motion of plaintiff which recites that upon her verified petition for an order on Shaver to turn over $80 to her, which he had collected from her former husband, it was ordered that the matter be referred to a special commissioner for hearing. The petition filed by Mrs. Edwin is not in the record before us. Shaver filed his answer to the petition, which is in the record, from which it appears that he was claiming the $80 in payment of services he had rendered in endeavoring to collect the amounts due under that decree from plaintiff's former husband. The special commissioner made a report in which he refers to the divorce decree and the three items to be paid by defendant in the divorce suit, viz., the doctor's bill, $250, the hospital bill, $75, and solicitor's fees, $150, and finds that Arthur G. Edwin, defendant in the divorce suit, paid to Shaver $250; that Shaver had distributed that amount by retaining $125 for his fees; paid $125.00 to Dr. Bullen; $15 on account of the hospital bill; $10 court costs, and that he retained the $80 which he refused to turn over to Mrs. Edwin. The commissioner recites that Shaver testified before him as to what he had done in endeavoring to collect the money due under the divorce decree; that he had collected the $250 and made disbursements as above stated. The commissioner found that Shaver had an understanding with his client that he would charge her an additional fee for his services in endeavoring to collect the money; that he could have sued defendant in the divorce suit for non-payment, and would have

had the court enter an order for additional fees for solicitor's services, and the commissioner found Shaver was not entitled to retain the $50 but on the contrary that it belonged to Mrs. Edwin.

The report of the commissioner was on December 23, 1938, approved and Shaver was ordered to pay $50 to Mrs. Edwin. He failed to comply and the following March 22, she filed her petition setting up the facts and that the order of December 23 did not fix the time within which the payment was to be made and it was prayed that the time be specified. On the same day, an order was entered decreeing that the $50 be paid by Shaver within five days. Nothing appears to have been done until April 12, following, when Mrs. Edwin filed her petition again stating the facts and the failure of Shaver to pay the $50. The prayer was that a rule be entered against Shaver to show cause why he should not be held to be in contempt of court for such failure. On the same day an order was entered requiring Shaver to show cause why he had not paid the $50. The next that appears is that on April 21, Shaver filed his written motion to quash the rule to show cause, and on that day an order was entered setting the matter for hearing April 24. April 25, another order was entered which recites the rule to show cause came on, both parties represented, and it was ordered that the hearing on the rule and Shaver's petition for a change of venue be heard April 26. That order was entered, as was the prior order, by Judge O'Connel, and on April 27, an order was entered by Judge Lupe, which is the order appealed from, by which Shaver was adjudged to be guilty of contempt for failure to pay the $50 and he was committed, as above stated.

Plaintiff has filed no brief in this court.

Shaver contends that he was entitled to be compensated for the services he rendered to Mrs. Edwin after the divorce decree "on the basis of an implied contract." Whether this position is tenable or whether he would be required to look to defendant in the divorce case for payment of his services, as is the common practice, we do not decide, for we are clearly of opinion that he had no right to

had the court enter an order for additional fees for solicitor's services, and the commissioner found Shaver was not entitled to retain the $50 but on the contrary that it belonged to Mrs. Edwin.

The report of the commissioner was on December 22, 1926, approved and Shaver was ordered to pay $50 to Mrs. Edwin. He failed to comply and the following March 22, she filed her petition setting up the facts and that the order of December 22 did not fix the time within which the payment was to be made and it was prayed that the time be specified. On the same day, an order was entered decreeing that the $50 be paid by Shaver within five days. Nothing appears to have been done until April 22, following, when Mrs. Edwin filed her petition again stating the facts and the failure of Shaver to pay the $50. The prayer was that a rule be issued against Shaver to show cause why he should not be held to be in contempt of court for such failure. On the same day an order was entered requiring Shaver to show cause why he had not paid the $50. The next that appears is that on April 23, Shaver filed his written motion to quash the rule to show cause, and on that day an order was entered setting the matter for hearing April 24. April 25, another order was entered which recites the rule to show cause came on, both parties represented, and it was ordered that the hearing on the rule and Shaver's petition for a change of venue be heard April 28. That order was entered, as was the prior order, by Judge d'Ennel, and on April 27, an order was entered by Judge Inge, which is the order appealed from, by which Shaver was adjudged to be guilty of contempt for failure to pay the $50 and he was committed, as above stated.

Plaintiff has filed no brief in this court.

Shaver contends that he was entitled to be compensated for the services he rendered to Mrs. Edwin after the divorce decree "on the basis of an implied contract." Whether this position is tenable or whether he would be required by law to betrothed in the figure sum for payment of his services, as is the common practice, we do not decide, for we are clearly of opinion that he had no right to

retain $50 which he had collected under the terms of the decree without first having had an agreement or understanding to that effect with Mrs. Edwin, and it is undisputed that he had no such agreement. If Shaver's position were sustained, the result would be that where a solicitor for a plaintiff in a divorce suit, rendered services after the decree was entered in endeavoring to collect the alimony or moneys in lieu thereof, he could retain from moneys thus collected by him, without any agreement, such a sum as his services were reasonably worth. We think such a proceeding cannot be approved.

Shaver has repeatedly and wilfully refused to obey the orders of the court requiring him to pay the $50. In these circumstances, we think the court was warranted in committing him until and unless he paid the $50.

While it is not necessary for a decision of this case, we think we ought to say that the practice of referring such simple matters as those involved in the instant case to a special commissioner or a master ought not to be approved. The matter could be disposed of in a short time by the chancellor without any unnecessary expense.

The order of the Superior court of Cook county is affirmed.

ORDER AFFIRMED.

McSurely, J., concurs.

Mr. Presiding Justice Matchett specially concurring:

I concur with reluctance. The solicitor should have complied with the order of the court but the extraordinary powers of the court might well have been used to compel defendant to comply with the decree. Respondent should comply with the order and petition the court to make an allowance for fees against defendant.

train his wife to be solicited under the guise of the Jones without first being had an agreement or understanding in that effect with Mrs. Ebbin, and it is undisputed that he had no such agreement. If Shaver's position were sustained, the result would be that where a solicitor for a plaintiff in a divorce suit, rendered services after the decree was entered in endeavoring to collect the alimony or money in lieu thereof, he could retain from moneys thus collected by him,without any agreement,such a fee as his services were reasonably worth. We think such a proceeding cannot be approved.

Shaver has repeatedly and willfully refused to obey the orders of the court requiring him to pay the $30. In these circumstances, we think the court was warranted in committing him until and unless he pays the $30.

While it is not necessary for a decision of this case, we wish we might be say that the practice of referring such simple matters as those involved in the instant case to a special commissioner or a master ought not to be approved. The matter could be disposed of in a short time by the chancellor without any unnecessary expense.

The order of the Superior Court of Cook County is affirmed.

ORDER AFFIRMED.

Burnett, J., concurs.

Ex. Presiding Justice Niedecker specially concurring:

I concur with reluctance. The solicitor should have complained with the order of the court but the extraordinary powers of the court might well have been used to compel defendant to comply with the decree. Respondent should comply with the order and petition the court to make an allowance for fees against defendant.

304 Ill. App.

40998

CHICAGO TITLE AND TRUST COMPANY, a corporation, as Trustee,
Appellee,

v.

CHARLES J. ROUTTE, et al.,
Appellees.

On Appeal of
STEVEN U. BROOKS, Intervening Petitioner,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

304 I.A. 589

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 19, 1937, the Chicago Title & Trust Company, as trustee in a trust deed, filed its bill to foreclose the lien of a trust deed given to secure an indebtedness of $55,000. The bill was a representative suit brought on behalf of all of the owners of the unpaid bonds aggregating about $50,000. Afterward the bill was amended and July 29, 1937, by leave of court, a bondholders' committee was permitted to intervene and on that day filed its petition alleging it represented $34,600 par value of the bonds; that certain other bonds aggregating $7,500 had been paid and surrendered to the owners of the equity and that these bonds should be decreed to be paid or subordinated to the balance of the bonds. August 3, plaintiff, the trustee, filed its answer to the intervening petition, and September 10, following, the matter was referred to a master in chancery to take the evidence and make up his report. The master took the evidence and April 23, 1938, submitted his report finding that all of the unpaid bonds were on a parity. The bondholders' committee filed objections to the report but plaintiff, the trustee, filed no objections but on the contrary filed briefs with the master and afterward with the chancellor contending that the bonds owned by Brooks, who prosecutes this appeal, were on a parity with the balance of the unpaid bonds. The objections were overruled by the master. His report was filed

No. 14,589

Appellee.

Appellant.

Appellee.

Appellee.

Appellee

January 31, 1939. The objections were ordered to stand as exceptions and after a number of hearings before the chancellor, the last being had June 16, 1939, the chancellor stated he would sustain the exceptions to the report and hold that the Brooks bonds would be subordinated to the payment of the balance of the unpaid bonds. The next day counsel for Brooks served notice that on June 19, they would ask leave to file an intervening petition to permit Brooks to intervene and become a party defendant and for a re-reference to the master for the introduction of additional evidence. The verified petition for Brooks was presented, an answer submitted by the bondholders' committee and July 6, the court entered an order denying Brooks leave to file the intervening petition. It is from this order that Brooks appeals.

Brooks, in his petition, alleged he was a purchaser for value before maturity of certain specific bonds of the issue being foreclosed aggregating $4,100; that he had been informed evidence was introduced before the master "concerning alleged subordination of said bonds;" that the court had sustained exceptions to the master's report which found that Brooks' bonds "were on a parity with the remaining bonds and has directed that a decree be entered finding such bonds subordinated to the remaining bonds secured by the trust deed" and the prayer of the petition was that he be given leave to file it and become an additional party defendant; that the matter be re-referred to the master "for the purpose of taking evidence concerning the allegations of this petition, and that the Master be directed to report." The trustee submitted no answer to the intervening petition which Brooks sought to file.

Brooks contends that the court erred in denying him leave to intervene in the suit; that he had an absolute right to intervene because section 25 [149] of the Civil Practice Act, chap. 110, Ill. Rev. Stats. 1939, authorized such intervention and that the matter was not within the discretion of the court. Section 25 [149] provides: "Where a complete determination of the controversy cannot be had with-

January 21, 1930. The objections were ordered to stand as exceptions and also a number of letters before the committee, the last being dated June 18, 1929, the committee report to which matters the objections in the report and held that the issues herein would be subordinated to the payment of the balance of the unpaid bonds. The next day counsel for Brooks served notice that on June 19, they would ask leave to file an intervening petition to permit Brooks to intervene and become a party defendant and for a re-reference to the master for the introduction of additional evidence. The verified petition for Brooks was presented, an answer submitted by the bondholders' committee and July 8, the court entered an order denying Brooks leave to file the intervening petition. It is from this order that Brooks appeals.

Brooks, in his petition, alleged he was a purchaser for value before maturity of certain specific bonds of the issue being foreclosed aggregating $4,100; that he had been informed evidence was introduced before the master "concerning alleged subordination of said bonds;" that the court had furnished copies of the masters' report which found that Brooks' bonds "were on a parity with the participating bonds and has directed that a decree be entered finding such bonds subordinated to the remaining bonds secured by the trust deed; and the prayer of the petition was that he be given leave to file it and have an additional party defendant; that the matter be referred to the master "for the purpose of taking evidence concerning the allegations of said petition, and that the master be directed to report." The trustee submitted no answer to the intervening petition which Brooks sought to file.

Brooks contends that the court erred in denying his leave to intervene in the suit; that he has an absolute right to intervene because section [134] of the civil Practice Act, sec. 134, Ill. Rev. Stats. 1929, authorizes such intervention and that the matter was not within the discretion of the court. Section 34 [134] provides "Upon a sufficient determination of the controversy cannot be had with-

out the presence of other parties, the court may direct them to be brought in. Where a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party. A new party shall be brought in by the service of the summons, which shall be drawn in the usual form with the addition of the statement, preceding the teste thereof, that this summons is issued pursuant to an order of the said court made on a date named." It is argued that by virtue of this section, Brooks had a right to intervene any time before the entry of the decree, and Bachellor v. Dockterman, 291 Ill. App. 418; Svela v. Bloch, 294 Ill. App. 515 and Groves v. Farmers' State Bank, 368 Ill. 35, are cited.

The Bachellor case is not in point. In that case, Bachellor was not a party to the suit although he had a definite interest in the subject matter of it, while in the case at bar, Brooks was represented by the trustee who represented all of the bondholders and filed the foreclosure suit in a representative capacity for all of the owners and holders of the bonds.

The Svela case was a bill to foreclose a mechanic's lien. After the case was heard but before a decree was entered, Fannie F. Newton, who was not a party to the suit, sought to intervene claiming she was the present owner of the property involved. The court held it was proper to permit her to intervene. We think it obvious this case is not in point.

In the Groves case, an order was entered denying thirty-four stockholders and eight depositors leave to intervene in a stockholders' liability suit. On appeal the Supreme court affirmed the order. Counsel for Brooks quote from that opinion the following: "Intervention, even when permissible, must be had during the pendency of an action before the issues between the original parties have been determined and a final decree has been entered." But this language does not hold that the court must permit anyone to interfere if he applies before a final decree is entered.

We think there is nothing in section 25 that makes it obli-

out the presence of other parties, the court may direct them to be brought in. Where a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party. A new party shall be brought in by the service of the summons, which shall be drawn in the usual form with the addition of the statement, preceding the texts thereof, that this summons is issued pursuant to an order of the said court made on a date named." It is argued that by virtue of this section, Brooks had a right to intervene any time before the entry of the decree, and Moehlfler v. Hoehstrasser, 221 Ill. App. 418; Ivels v. Black, 204 Ill. App. 318 and Graves v. Farmers' State Bank, 249 Ill. 56, are cited.

The Moehlfler case is not in point. In that case, Moehlfler was not a party to the suit although he had a definite interest in the subject matter of it, while in the case at bar, Brooks was represented by the trustee who represented all of the bondholders and filed the foreclosure suit in a representative capacity for all of the owners and holders of the bonds.

The Ivels case was a bill to foreclose a mechanic's lien. After the case was heard but before a decree was entered, Fannie V. Morton, who was not a party to the suit, sought to intervene claiming she was the present owner of the property involved. The court held it was proper to permit her to intervene. We think it obvious this case is not in point.

In the Graves case, an order was entered denying thirty-four stockholders and eight depositors leave to intervene in a stockholders' liability suit. On appeal the Supreme court affirmed the order. Counsel for Brooks quote from that opinion the following: "Intervention, even when permissible, may be had during the pendency of an action before the issues between the original parties have been determined and a final decree has been entered." But this language does not hold that the court must grant leave to intervene if he applies before a final decree is entered.

We think there is nothing in section 26 that bars it this-

gatory on the court to permit Brooks to interfere. He was represented by the trustee and his counsel in their brief say: "Counsel for Brooks conceded that he had known about the foreclosure proceedings from the beginning and the Judge denied the motion upon the ground that his petition was presented too late." We think the matter was within the discretion of the court. Lake View Tr. & Savings Bank v. Rice, 279 Ill. App. 538. And there is no contention that the court abused its discretion.

Moreover, there is another reason why the order appealed from must be affirmed. Brooks, in his verified petition by which it was sought to intervene, makes no allegation either by way of fact or merely by conclusion that he had any additional evidence to offer if the case were re-referred to the master. If he had made such a showing and it appeared that his rights had not properly been protected, obviously a different question would be presented. But no such showing was attempted. For aught that appears, Brooks' rights were protected by the plaintiff trustee. The trustee endeavored to sustain the master's report before the chancellor which was in Brooks' favor. But when its contention was overruled plaintiff trustee took the position, and we think properly, that the contest was between conflicting interests of bondholders.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and McSurely, J., concur.

mandamus on the court to permit Brooks to intervene. He was represented by the trustee and his counsel in their brief may "reasonably be inferred concerning that he had knowledge of the forecloseure proceedings from the beginning and the judge denied the motion upon the ground that the petition was presented too late." In Ex parte the better view obtains the discretion of the court. Ex parte Tr. & Savings Bank v. Ohio, 272 Ill. App. 606. And there is no contention that the court abused its discretion.

However, there is another reason why the order appealed from must be affirmed. Brooks, in his verified petition in which it was sought to intervene, made no allegation either by way of fact or merely by conclusion that he had any additional evidence to offer if the case were reopened in the master. If he had made such a showing and if he asserted that his rights had not properly been protected, obviously a different question would be presented. But no such showing was attempted. For aught that appears, Brooks' rights were protected by the plaintiff trustee. The trustee endeavored to sustain the master's report before the chancellor which was in Brooks' favor, but when the contention was overruled plaintiff trustee took the position, and we think properly, that the contest was between conflicting interests of bondholders.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, P.J., and Sullivan, J., concur.

304 M. App.

40090

AUGUSTUS H. GRUNEWALD, JR., Administrator of the Estate of AUGUSTUS H. GRUNEWALD, Deceased, ELSA B. GRUNEWALD, LOUISE G. HOPKINS, HANSEN G. FEYGH, MARTHA G. BAKIN, INGELLE H. GRUNEWALD, MARGUERITE A. GRUNEWALD, AUGUSTUS H. GRUNEWALD, JR., and CARL F. GRUNEWALD,

Appellees,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM THE CIRCUIT COURT, COOK COUNTY.

304 I.A. 589

MR. PRESIDING JUSTICE MORRIS B. SULLIVAN delivered the opinion of the court.

The above entitled case was before this court on a former appeal and was sent to the Supreme Court for consideration, which court has remanded it to this court.

It is agreed by both plaintiffs and defendant herein that this is an action for damages alleged to have been sustained by plaintiff because of damages to his real estate at 10-14 East Kinzie Street in Chicago, in consequence of the construction of the north viaduct or approach to the bridge spanning the Chicago River at Wabash avenue, the change of grade of the streets, sidewalks and an alley adjacent to the plaintiffs' property as an incident to the construction of such public work, and the construction of a ramp in the south half of East Kinzie street.

The cause was tried before a court and jury. The verdict of the jury found the issues for the plaintiffs and assessed the plaintiffs' damages at $34,084.14, the jury, by a special finding in response to an interrogatory, fixed the amount

awarded for a particular element of the damages at $15,000.00. The special finding was in response to the following motion of the City of Chicago which was made on October 20, 1937, requesting the court to require the jury to find specially upon the following material question of fact submitted by defendant:

> "What portion of the damages, if any, were caused by the construction of the ramp or viaduct extending westerly from N. Wabash Avenue along the south side of E. Kinzie Street, immediately north of the building known as Central Chicago Garages, Inc.?"

To this special interrogatory the jury returned a finding of $15,000.00. There is no claim that this $15,000.00 was in addition to the general verdict for $24,604.14, which found defendant guilty and assessed the damages at the latter figure.

No issue was raised on the pleadings.

Plaintiffs' theory of the case is that the change of grade of East Kinzie street along the front of their property, the change of grade of what is now North Wabash avenue (formerly Cass street), the change of grade of an alley along 32 feet of its length and at a point more than 100 feet away from the plaintiffs' property, and the construction of a ramp on pillars in the south half of East Kinzie street opposite the east 40 of the 80 feet of frontage of the plaintiffs' property caused a decrease in the fair cash market value of the plaintiffs' property of not less than $42,500.00.

The defendant's theory of the case is that by providing a new means of reaching the Loop district from the plaintiffs' property and giving to the plaintiffs' property and its vicinity a new prominence and importance, the construction of the improvement conferred benefits which were sufficient to equal or exceed the detriments resulting from the change of grade of East Kinzie street, North Wabash avenue and a portion of the alley, with the exception of a cash outlay by the plaintiffs of $1,584.15 for the construction of a retaining wall; and that the amount of this

needed for a particular element of the income of $12,000.00.

The special finding was in response to the following motion of the City at Chicago which was made in October 1a, 2000, requesting the court to require the jury to find specially upon the following material question of fact submitted by defendant:

"What portion of the damages, if any, were caused by the construction of the trap or viaduct extending westerly from S. Michigan Avenue along the north side of S. Illinois Street, immediately north of the building known as Central Station Building, Inc.?"

To this special interrogatory the jury returned a finding of $12,000.00. There is no claim that this $12,000.00 was in addition to the general verdict for $24,000.00, which found defendant guilty and assessed the damages at the latter figure.

No issue was raised as to the plaintiffs.

Plaintiff's theory of the case is that the change of grade of Lake Street adjacent the front of their property, the change of grade of what is now North Michigan Avenue (formerly Pine Street), the change of grade of an alleyway in front of its Lands and at a point more than 100 feet away from the plaintiff's property, and the construction of a trap or viaduct in the north half of Lake Street street opposite the east 4½ of the 25 feet of frontage of the plaintiff's property caused a damage to the fair cash market value of the plaintiff's property of not less than $20,000.00.

The defendant's theory of the case is that by permitting a new means of reaching the Loop District from the plaintiff's property and giving to the plaintiff's property and its vicinity a new prominence and importance, the construction of the improvements complained of in the petition, when considered as a whole, benefited the plaintiff's property and its vicinity. The defendants contend that the change of grade of Lake Street, North Michigan Avenue and a portion of the alley, with the construction of a trap valuing by the plaintiffs of $1,000.00 for the construction of a retaining wall, and that the cost of this

cash outlay plus an amount not exceeding $4,000 representing a decrease of the fair cash market value of the plaintiffs' property as a result of the construction of the ramp in a portion of the south half of East Kinzie street constitute the maximum amount of damage which the plaintiffs are entitled to recover.

It is also the theory of the defendant on this appeal that the inflammatory argument made by the plaintiffs' attorney to the jury in which prejudicial treatment was given an agreement whereby the city was to be indemnified for part of the damages claimed by the plaintiffs, and an exchange of land and easements with the Chicago and North Western Railway Company for the purpose of obtaining land and air rights necessary for the construction of the bridge and the viaduct, together with the court's persistent refusal to rule upon objections thereto, necessarily operated to persuade the jury to render a verdict for a grossly excessive amount of money.

It is also the theory of the defendant on this appeal that none of the plaintiffs proved title to the cause of action asserted in this case.

It appears that plaintiffs and defendant have practically admitted by the evidence that damage was done to plaintiffs' real estate, the question then remaining to be decided is what would be the proper amount to fix as a just compensation. Certain witnesses for plaintiffs estimated that the real estate was damaged to the extent of $45,000.00, while witnesses for the city placed the damages as low as nothing to as high as $5,000.00.

The evidence shows that the construction of the retaining wall supporting the plaintiffs' property from the street cost the plaintiffs $1,504.14.

such action plus an order not exceeding $5,000 notwithstanding a
deviation of the duty such action value of the plaintiffs' property
as a result of the construction of the ramp is a portion of the
south half of that fifty above establishes the maximum amount
of damage which the plaintiffs are entitled to recover.

It is also the theory of the defendant on this appeal
that the inflammatory argument made by the plaintiffs' attorney
to the jury in which prejudicial testimony was given in argument
whereby the city was to be indemnified for part of the damages
claimed by the plaintiffs, and an exchange of land and accounts
with the County and Bureau Highway Engineer for the purpose
of obtaining land and air rights necessary for the construction of
the bridge and the viaduct, together with the court's peremptory
refusal to give some explanation thereto, constitutionally prevented the
jury to render a verdict for a greater amount of money.

It is also the theory of the defendant on this appeal
that none of the plaintiffs proven title to the owner of record
appeared in this case.

It appears that plaintiffs and defendant have practically
admitted by the evidence that damage was done to plaintiffs' real
estate; the question then presenting to be decided is what would be
the proper amount to fix as a just compensation. Certain witnesses
for plaintiffs maintained that the real estate was damaged to the
extent of $40,000.00; while witnesses for the city placed the
damages as low as nothing to as high as $4,000.00.

The evidence shows that the appellees of the respondent
will recover the plaintiffs' property from the street and the
plaintiffs $2,994.34.

The trial judge and the jury viewed the real estate, and having the situation well in mind as a result thereof, the jury returned a verdict finding the issues for the plaintiffs and assessed plaintiffs' damages at $34,084.14, and then the jury, by a special finding in response to an interrogatory, fixed the amount awarded for a particular element of the damages at $15,000.00. The two judgments were entered on the verdict, each for the full amount.

In Department of Public Works and Buildings v. Kurzman, State Trust and Savings Bank, 363 Ill. 13, our Supreme Court at page 24, held:

> "It is well settled that the damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, the jury views the premises, and the amount of compensation awarded is within the range of the evidence, unless the verdict appears to have been a clear and palpable mistake or the result of passion and prejudice."

We think this rule of law is plainly applicable in the instant case.

Complaint is made that the court erred in its rulings upon the objections to arguments of counsel for plaintiffs as going outside the evidence in commenting thereon. Objections and motions to strike cover nearly one hundred pages of the record. They consist principally of objections and exceptions to the statements of counsel for the property owners in his interpretation of what the evidence showed and the deductions which he drew therefrom. We think the court patiently and correctly admonished counsel to keep within the evidence in his comments and instructed the jury repeatedly not to be governed by any remarks of counsel which were not supported by the evidence. We do not think plaintiffs went outside the sphere of proper comment to a prejudicial extent. The argument of plaintiffs' counsel was confined to the evidence and we cannot say that anything counsel for plaintiffs said was calculated to unduly excite or prejudice the defendant's rights before the

The trial judge and the jury viewed the real events, and having the situation well in mind as a result thereof, the jury returned a verdict fixing the losses for the plaintiff's and assessed plaintiff's damages at $24,000.00, and then the jury, by a special finding in response to an interrogatory, fixed the amount awarded for a particular element of the damage at $12,000.00. The two judgments were entered on the verdict, each for the full amount.

In Southern of Florida Bank and Trust Company v. Brennan, Florida Trust and Savings Bank, 280 Fla. 1, the Supreme Court at page 34, said:

> "It is well settled that the damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting, the jury views the premises, and the amount of compensation awarded is within the range of the evidence, unless the verdict manifests on jury bias a mistake and palpable mistake or the result of passion and prejudice."

We think this rule of law is plainly applicable in the instant case.

Complaint is made that the court erred in the rulings upon the objections to testimony of counsel for plaintiffs as being outside the evidence in connecting thereon. Objections and motions to strike were timely and included grounds of the absence. They consist particularly of objections and exceptions to the admission of testimony for the propriety vested in the interpretation of what the evidence showed and the deductions which he drew therefrom. We think the court partially and correctly admonished counsel to keep within the evidence in his comments and instructed the jury properly not to be governed by any remarks of counsel which were not supported by the evidence. We do not think plaintiffs were entitle the values of income because to a prejudicial extent. The testimony of plaintiffs' counsel was confined to the evidence and we cannot say that anything counsel for plaintiffs said was calculated to unduly excite or prejudice the defendant's rights before the

jury.

In the case of Commonwealth Electric Co. v. Hoss, 214 Ill. 545, wherein it was alleged that improper remarks were made before the jury, the court at pp. 561-562, defined the limits of counsel's comments and said:

> "Complaint is also made on behalf of the appellant that counsel for appellee made improper remarks in his address to the jury. We discover nothing in the remarks so made, which transgressed the limits of legitimate argument. The remarks, alleged to have been improper, related to the acceptance of the ordinance by the appellant company, and the failure of that company to obey it after its acceptance. The inferences and argument in reference to the acceptance were, as we think, justified by the facts, and such facts were substantially undisputed. Other remarks, alleged to have been improper, were comments made by counsel upon the testimony and conduct of one of the appellant's witnesses. Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibilityof witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. 'He may argue such conclusions fromthe testimony as he pleases, provided he does not misquote witnesses.' (2 Ency. of Pl. & Pr. p. 716.) It has been said: 'Just and fierce invective, when based upon the facts in evidence and all legitimate inferences therefrom, is not discountenanced by the Courts.' (2 id. p. 747.)"

Complaint is made that the judgment in this case is in favor of the heirs of the original plaintiff, he having died since the commencement of the original suit. The complaint is made that the court permitted this to be done after the judgment was entered. This action was taken when a petition was filed setting forth the fact of the death of the original plaintiff and an order to permit the substitution of heirs was entered. An additional appeal was entered to such amended pleadings, the provisions of which raised only the statute of limitations, and in no manner denied or traversed the capacity in which the plaintiff sued. We are of the opinion that in order that these questions be properly presented for our consideration, they should have been presented in the lower court, so that there might be a ruling by that court, which we could then review.

As was said in Commercial Trust Co. v. Mallers, 347 Ill. 56, at page 58:

> "If the plaintiff in error desired to raise the question of the capacity of the defendant in error to sue he should have done so in the trial court by a plea in abatement or otherwise, (Stoetzell v. Fullerton, 44 Ill. 108; Life Association of America v. Fassett, 102 id. 315;) and having failed so to do, the judgment rendered against him in the name of the defendant in error was a valid and binding judgment, and if the judgment was a binding and valid judgment, the defendant in error, under the statute, had the right to enforce its collection by execution." Mallers v. Commercial Loan & Trust Co., 216 U.S. 413.

As was said in The People v. Hamill, 259 Ill. 506:

> "Want of authority to bring a suit is a dilatory defense which must be raised at the earliest possible moment and is properly raised by a motion to dismiss, but the defense is not one which may be pleaded in bar of the action."

No question was raised in the trial court as to the capacity of the plaintiffs to sue, nor was such question raised in its motion for a new trial. We think the action of the trial court was in pursuance of Paragraph 1, Section 92 of the Civil Practice Act, and was not erroneous.

In reviewing this record we cannot say that any prejudicial error was committed which would justify a reversal of the decision reached in the trial court. It is practically conceded by defendant that some amount of damages are due plaintiffs, the amount of which was determined by the method provided by law, viz: a trial by judge and jury, and a view of the premises. We cannot find any basis upon which defendant could expect to change the decision of the trial court. It is alleged by defendant that errors were committed by the trial court in its rulings, but we have been unable to find any ruling which was made by the trial court which was not within the purview of the law and evidence.

As was said in Commercial Trust Co. v. Bellows, 66 Ill.

89, at page 92:

> "If the plaintiff in error desired to raise the question of the severity of the defendant in error in not be should have done so in the trial court by a plea in abatement or otherwise. Lombard v. Bellows, 66 Ill. 89; Lake Superior Iron Co. v. Blackman, 76 Ill. 518. and before filing an in the judgment rendered against him on the merits of the defendant in error was a valid and binding judgment, and if the judgment was a binding and valid judgment, the interest in which, under the statute, had the right to enforce its collection by execution. Commercial Loan & Trust Co. v. Bellows, 66 Ill. 89."

As has said in Mutchenbaker v. Bailey, 108 Ill. 500:

> "Mode of enforcing the judgment is left to a different tribunal which must be determined the authority granting judgment and is provided relief by a motion to quashing, but the defense is not the plea only to be pleaded in the of the action."

The question was raised in the trial court as to the

legality of the plaintiffs in one, but was not question raised

in the motion for a new trial. In fact, the motion of the trial

court was in pursuance of Paragraph 1, Section 68 of the Civil

Practice Act, and was not erroneous.

In evaluating this record we cannot say that any pre-

judicial error was committed which would justify a reversal of

the decision rendered in the trial court. It is probably over-

looked by defendant that some amount of damages are due plaintiff,

the amount of which has determined by the action provided by law,

what a trial by judge and jury, and a view of the premises. We

cannot find any basis upon which defendant could depend to change

the decision of the trial court. It is alleged by defendant that

errors were committed by the trial court in its ruling, but we

have been unable to find any ruling which was made by the trial

court which has not been within the province of the law and evidence.

We think the verdict and judgment entered by the trial court are in accordance with the law and the evidence, and for the reasons herein stated the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. CONCURS;
BURKE, J. TOOK NO PART.

40835

ANNA YUNGER,

Appellant,

v.

JENNIE E. YUNGER,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Anna Yunger, brings this appeal from a judgment for costs entered in the Municipal Court of Chicago in favor of defendant Jennie E. Yunger. The suit was based on a promissory note for the sum of $1,000.00 and interest, which note was executed by defendant and her husband on November 30, 1928; said defendant's husband having died prior to the time suit was commenced. The note was to bear interest at the rate of 6 per cent per annum after date.

Said note reads as follows:

"$1,000.00 Chicago, Illinois Nov. 30, 1928.

One Year after date for value received We promise to pay to the order of Mrs. Anna Yunger One Thousand Dollars at the office of the Twenty-Sixth Street State Bank, Chicago, Illinois, with interest at 6 per cent per annum after date until paid.*** "

In addition to the above the note contained the usual judgment clause authorizing the entry of judgment and was signed by Edward Yunger and Jennie E. Yunger and was sealed.

The defense is that the note was not delivered; that the defendant received no value therefor and that there was no consideration on the part of this defendant for the execution of said note; that this defendant's signature on said note was obtained by fraud, duress, threats and fear and that the particulars of the fraud are as follows:

Plaintiff, Anna Unger, brings this action to recover from a judgment
her husband obtained in the Municipal Court of Chicago in favor of
defendant Dennis E. Unger. The suit was based on a promissory note
for the sum of $5,000.00 and interest, which note was executed by
defendant and her husband on November 27, 1928; said defendant's
husband having died prior to the time suit was commenced. The note
was in been delivered at the rate of $ per week per annum after date.

Said note reads as follows:

"$5,000.00 Chicago, Illinois Nov. 27, 1928.

One year after date for value received we promise to pay
to the order of Mrs. Anna Unger One Thousand Dollars at the
office of the Fourth-Ashland street State Bank, Chicago, Illinois,
with interest at 6 per cent per annum after date until paid."

In addition to the above the note contained the usual judgment clause
authorizing the entry of judgment and was signed by Edward Unger
and Dennis E. Unger and was sealed.

The defense is that the note was not delivered; that the
husband received no value therefor and that there was no consider-
ation as the part of this defendant for the execution of said note;
that this defendant's signature on said note was obtained by fraud,
duress, threats and fear and that the particulars of the fraud
are as follows:

George Yunger, the brother of the deceased husband of this defendant, brought the said note to this defendant, threatening this defendant and demanding that she sign it; that her deceased husband had borrowed the money from his, Edward Yunger's mother, and George Yunger, by threat, intimidation and fear, induced this defendant to sign the said note.

It appears from the evidence that this transaction is a family affair as the principals and most of the witnesses are related to each other; that the defendant's husband obtained the money from plaintiff, which amounted to $1000.00, and with full knowledge of this the defendant herein and her husband signed the note; that at the time she signed the note she was busy in a restaurant which she and her husband owned and the person who brought the note to her was a relative and explained its purpose; that this defendant made some inquiries about the note and signed it and delivered it to the person who had brought it to her. The evidence does not show that any threats were made at the time defendant herein signed the note or that she was under duress.

This cause was tried by a court without a jury and we hesitate to disturb a judgment where the trial court has seen and heard the witnesses testify, but with due regard to the usual rule in such cases, we are forced to the conclusion that the judgment entered by the trial court was incorrect and should have been in favor of plaintiff. To correct this error and for the reasons herein given, the judgment of the Municipal Court is reversed and judgment is entered here for plaintiff and against defendant for the sum of $1,000.00 with interest at the rate of six per cent from November 30, 1928.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR PLAINTIFF FOR $1,000.00 WITH INTEREST.

HEBEL AND BURKE, JJ. CONCUR.

George Kunger, the brother of the deceased husband of this defendant, brought the said note to this defendant, threatening this defendant and demanding that she sign it; that her deceased husband had borrowed the money from him, Edward Kunger's mother, and George Kunger, by threats, intimidation and fear, induced this defendant to sign the said note.

It appears from the evidence that this transaction is a family affair as the principals and most of the witnesses are related to each other; that the defendant's husband obtained the money from plaintiff, which amounted to $1000.00, and with full knowledge of this the defendant herein and her husband signed the note; that at the time she signed the note she was busy in a restaurant which she and her husband owned and the person who brought the note to her was a relative and explained its purpose; that this defendant made some inquiries about the note and signed it and delivered it to the person who had brought it to her. The evidence does not show that any threats were made at the time defendant herein signed the note or that she was under duress.

This cause was tried by a jury and we hesitate to disturb a judgment where the trial court has seen and heard the witnesses testify, but with due regard to the usual rule in such cases, we are forced to the conclusion that the judgment entered by the trial court was incorrect and should have been in favor of plaintiff. To correct this error and for the reasons herein given, the judgment of the Municipal Court is reversed and judgment is entered here for plaintiff and against defendant for the sum of $1,000.00 with interest at the rate of six per cent from November 30, 1922.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF FOR $1,000.00 WITH INTEREST.

McNAB, AND MERRIL, JJ., CONCUR.

40883

CHICAGO TITLE AND TRUST COMPANY,
a corporation, as trustee,

Appellee,

v.

CHIEF RAIN COMPANY,
a corporation,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

304 Ill App.

304 I.A. 590

MR. PRESIDING JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is an appeal from a decree of the Superior Court which was entered pursuant to the mandate of the Supreme Court. This cause was before this court on a former appeal from a decree entered in the Superior Court removing the Chicago Title & Trust Company, as trustee. This court affirmed the decree of the Superior Court and the cause was then appealed to the Supreme Court. The Supreme Court reversed the judgment of the Appellate Court and the order of the Superior Court. The Supreme Court in its opinion entitled, Chicago Title & Trust Co. v. Chief Rain Co., 366 Ill. 146, in its mandate at page 150, said:

> "The judgment of the Appellate Court, and the order of the superior court of July 17, 1930, must each be reversed and the cause remanded to the latter court with directions to vacate the decree of June 5, 1930, and to enter a new decree permitting plaintiff to resign the trusteeship, dismissing the foreclosure action, and allowing plaintiff its costs and reasonable remuneration in connection with the trusteeship and such solicitor's fees, if any, as the chancellor deems fair, considering, of course, the factual situation presented in this opinion."

After the Supreme Court has passed upon questions presented for its consideration in any given case, and an order of reversal has been entered, the only question which may thereafter properly come before this court is as to whether or not the trial court followed out the mandate and the directions of the Supreme Court when the cause was retried.

In the instant case most of the argument presented by counsel for the contesting parties is devoted to questions which have been settled by the decision of the Supreme Court, which as we have explained, cannot be further considered by a trial court or this court.

In pursuance of the decision of the Supreme Court, the trial court did the following:

(1) Overruled the motion of the defendant to strike the petition as supplemented;
(2) Finding in favor of plaintiff and against the defendant in the sum of $3,704.33 for trustee's costs, fees and solicitors' fees;
(3) Approving the final account of the Chicago Title and Trust Company as trustee;
(4) Directing the trustee to retain $1,070.33 of the funds on hand as shown by said final account to apply on the allowance made to it for $3,704.33;
(5) Accepting the resignation of the trustee;
(6) Appointing The Trust Company of Chicago as Successor Trustee; and
(7) Dismissing the foreclosure proceedings.

Many authorities have been cited by opposing counsel on questions which cannot be considered by this court in view of the language used by the Supreme Court. The only question before this court at this time is whether or not the mandate of the Supreme Court was followed by the trial court.

From a review of the evidence as to the amount of fees, we do not think the amount excessive. We think the rights of all the parties have been analyzed and considered in the various appeals taken in this case and nothing would be gained by a further discussion on that subject at this time. Suffice it to say that we think the chancellor in his interpretation

After the Supreme Court has passed on a question presented for its consideration in any given case, and an order of reversal has been entered, the only question which may thereafter properly come before this court is as to whether or not the trial court followed and was governed by the directions of the supreme court when the mandate was received.

In the instant case most of the arguments presented by counsel for the contending parties in support of propositions which have been passed on by the decisions of the Supreme Court, which we have reviewed, succeed in further substantiating by a great deal more of this.

In pursuance of the decisions of the Supreme Court, the trial court did the following:

(1) Determined the status of the defendants by stating the qualifications as applicable;
(2) Ordered in favor of plaintiff and against the defendants in the sum of $1,[illegible] for Swedish's share, plus the attorneys' fees;
(3) Directed the final accounts of the fiduciaries which were thereupon approved;
(4) Directed the trustee to pay the fiduciaries out of the funds in hand as shown by said final accounts, equal to the allowance made to it by the decree;
(5) Directed the termination of the trusts;
(6) Directed the final discharge of fiduciaries in Sacramento County; and
(7) Exonerated the corporate trustee.

Such is briefly the information called for concerning certain questions which cannot be considered by this court in view of the language used by the Supreme Court. The only question before this court at this time is whether or not the mandate of the Supreme Court was followed by the trial court.

From a review of the evidence and in the opinion of the court, we do not think the second contention. We think the finding of the trial court have been analyzed and considered in the various opinions in this case and nothing would be gained by a further discussion at this time. Neither is we may that we think the characterization in the correspondence

of the mandate of the Supreme Court, which was his duty, has arrived at a conclusion which we believe is justified by the evidence and that his interpretation of the mandate of the Supreme Court should be and hereby is sustained.

DOCKET AFFIRMED.

MEEKS AND BURKE, JJ. CONCUR.

40963

LIVE STOCK NATIONAL BANK OF CHICAGO, as administrator of the Estate of IGNAZIO MIGLIORISI,

Plaintiff - Appellee,

v.

GUY A. RICHARDSON and WALTER F. CUMMINGS, as Receivers, etc., et al.,

Defendants - Appellants,

and

ELLEN McKENNA.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE HUNKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Circuit Court of Cook County in the sum of $3,300.00, following the trial of a statutory action brought under the Injuries Act to recover pecuniary loss alleged to have been sustained by the widow and next of kin of Ignazio Miglierisi, by reason of his death, which the plaintiff alleged was proximately caused by injuries sustained while in the act of boarding a street car on Thursday, February 11, 1937.

The first contention is that the evidence fails to prove actionable negligence on the part of defendants, or due care on the part of the deceased. Plaintiff replies by asserting that the verdict and judgment are supported by the evidence, and that the case involved purely a question of fact which was properly resolved by the jury. Therefore, it has been necessary for us to carefully read the record in order to determine, as a question of law, whether, from the evidence in favor of plaintiff, standing alone and considered to be true, together with the inferences which may legitimately be drawn therefrom, the jurors acting as reasonable men, could find for the plaintiff.

Western Avenue is a north and south street, and Montrose Avenue is an east and west street, both in Chicago. Defendants

operate trolley cars propelled by electric power on both streets. The streets intersect. Montrose Avenue is 4400 north and Western Avenue is 2400 west. The city maintains traffic "stop and go lights" at all corners of the intersection. The north and southbound tracks are laid in the middle of Western Avenue. Commencing at a point 4 feet south of the south building line of Montrose Avenue, and at a point 3-1/2 feet east of the east rail of the north bound track, is a cement safety island, which extends in a southerly direction parallel with the east rail, for a distance of 100 feet. The width of the safety island is 4 feet 4 inches. It is 5 inches above the surface of the street. The width of the space from rail to rail is 4 feet 8-1/2 inches. The length of a street car is approximately 48 feet. Between the east side of the safety island and the west curb there was room for two automobiles to pass. The safety island is maintained by the city.

The widow of the deceased testified that he was 65 years of age, and his children testified that he was 58 years of age. He was born in Italy and was the father of four children. The family lived at 3538 South Morgan street, which is approximately 13 miles from Western and Montrose Avenues. He was in good health. He was a building laborer, but at the time, was not employed in that line. As temporary employment, he shelled peanuts in the vicinity of Ogden and Grand Avenues. So far as is shown by the evidence, he was not employed in the vicinity of Western and Montrose Avenues. On February 11, 1937, he had breakfast at 6 A. M. Then he left the house. The next time the members of the family saw him was at the Rogers Park Hospital in Chicago. He was then suffering from injuries which he received after he left home. As a result of the injuries, he died on February 13, 1937. Between 8:30 and 9 o'clock on the morning of February 11, 1937, a street car of the defendants was proceeding north on Western Avenue. Elijah Bates was the

service quality was jeopardized by starting work on both stores.

The wooden interwork, Interior woodwork is dull matte and features mahogany in dark wash. The city maintains worship rooms and an library at all corners of the intersections. The north and southbound trains are laid in the middle of western avenue. Commencing at a point 4 feet south of the south building line of Lexington Avenue, and at a point 8-1/2 feet east of the east rail of the north bound track, is a second safety island, which extends in a southerly direction parallel with the east rail, for a distance of 120 feet. The width of the safety island is 4 feet 4 inches. It is 3 inches above the surface of the street. The width of the space from rail to rail is 8 feet 8-1/2 inches. The length of a street car is approximately 46 feet. Between the rear rail of the safety island and the west curb there are from two hundred to pass. The safety island is maintained by the city.

The widow of the deceased testified that he was 38 years of age, and his children testified that he was 38 years of age. He was born in Italy and was the father of four children. The family lived at 3220 South Morgan street, which is approximately 12 miles from Sydney and Lexington Avenue. He was in good health. He was a building laborer, but at the time, was not employed in that line. In Chicago employment, he resided among in the vicinity of Queen and Orchard streets. He far as is known by the witnesses, he was not employed in the vicinity of Sydney and Lexington Avenue. On February 12, 1927, he had breakfast at 8 A. M. Then he left the house. The last time the members of his family saw him was at the Sydney Park Hospital in Chicago. He was then suffering from injuries which he received after he left home. As a result of the injuries, he died on February 12, 1927. Between 8:30 and 9 o'clock on the morning of February 12, 1927, a driver car of the defendants was travelling north on western avenue. Right then was the

conductor, and had been employed as such for 14 years. Elmer McKenna was the motorman, and had been so employed for 13 years. The car was of the Pullman type, with an open platform for the entrance of passengers at the rear. The weather was good and the pavement dry. The car stopped a few feet south of the south building line of Montrose avenue, alongside of the safety island. The determination of the case depends upon what happened at this point. There were only two eye witnesses, the conductor, who testified for defendants, and Walter Hanning, who testified for plaintiff. The conductor testified that he was in his usual position on the rear platform. There was one passenger on the rear platform, namely Hanning. When the car came to a stop he looked out and observed that the light had just changed to red. He looked out in order to ascertain whether any one was coming and to observe the light. The car would not start up even after the light changed, without a bell signal from him to the motorman. He observed a man, later admitted to be the deceased, Ignazio Miglioriai, standing on the safety island opposite the front part of the car. At that time no other person was standing beside the rear step of the car. No one alighted or boarded the car. He estimated that the car remained standing at the crossing for about 30 seconds, which was the time that passed before the light changed to green. When the light changed to green he gave the motorman two bells to proceed. While the car was standing at the safety island he observed Miglioriai for 30 or 35 seconds, and during that time he (Miglioriai) did not move in any manner toward the car. When the light changed to green, the deceased was standing at the front of the car at the extreme north end of the safety island. After the conductor gave the motorman the bell to proceed, the car started up. Witness was standing and looking out. He did not notice the man on the safety island move

conductor, and had been employed as such for 12 years. Since
relieve one the motorman, and had been so employed for 12 years.
The car was of the Pullman type, with an open platform for the
entrance of passengers at the front. The weather was good and the
premises dry. The car stopped a few feet south of the south building
line of Southern Avenue, alongside of the safety island. The
determination of the case depends upon what happened at this point.
There were only two eye witnesses, the conductor, who testified for
defendants, and Walter Hunting, who testified for plaintiff. The
conductor testified that he was in his usual position on the rear
platform. There was one passenger on the rear platform, namely
Hunting. When the car came to a stop he looked out and observed
that the light had just changed to red. He looked out in order to
ascertain whether any one was coming out to observe the light. The
car would not start up even after the light changed, without a bell
signal from him to the motorman. He observed a man, later identified
to be the deceased, Lynwin Wightman, standing on the safety
island opposite the front part of the car. At that time no other
person was standing beside the rear step of the car. As one
alighted on boarded the car. He estimated that the car remained
standing at the crossing for about 30 seconds, which was the time
that passed before the light changed to green. Then the light
changed to green as the motorman the bell to proceed. While
the car was standing at the safety island he observed alighted for
10 or 30 seconds, and during that time he (Wightman) did not move
in any manner toward the car. Then the light changed to green, the
deceased was standing at the front of the car as the motorman moved
out of the safety island. After the conductor gave the motorman
the bell to proceed, the car started up. Witness was standing and
looking out. He did not notice the car as the safety island was

at all until the car got up about even with him; that just about the time the rear of the car got to him, he reached and grabbed for it. He put up his hands. His hand touched the rear grab bar. The rear grab bar is on the rear part of the bulkhead of the car, rear of the step. There is a center grab handle there which extends from the floor to the top of the bulkhead of the car. It is an iron pipe. The man did not at any time put his feet on the step of the car. He did not at any time touch the center grab handle of the car. At the time he moved toward the car, I should judge the car was moving about 10 miles an hour. When I saw that man grab for the grab handle, I reached for the bell cord. He didn't get hold of the grab handle. After he reached for the grab handle, he swung around in back of the car. He fell right in about the center of the rails. The motorman stopped the car. I gave three pulls for an emergency stop." He stated that the car did not stop until it had passed the north cross walk of Montrose Avenue. Then the witness walked back to the safety island. He testified that the man was standing about even with the safety island and about 5 feet back of the building line; that the man did not talk to him in any language that he could understand; that while he was talking to him, a truck driver came up; that Miglierisi walked across Montrose Avenue and boarded the rear platform of the car; that no one assisted him in boarding the car; that the witness endeavored to talk to him; that the man did not say anything to him in any language he could understand; that he asked the man for his name and address, but he did not give either; that the car proceeded north with the man standing by the control box on the rear platform; that at the point where the Ravenswood Elevated Railroad crosses Western Avenue, a policeman, in uniform, boarded the car; that at the request of witness, the policeman spoke to Miglierisi and also searched his

pockets in an endeavor to identify him; that no one could understand what the man was saying to the officer; that the car stopped at Devon Avenue, which is 6400 north, where a supervisor named James A. Curry, got on; that Curry rode to the end of the line at Howard Street, which is 7600 north; that he tried to talk to the man; that at Howard Street, the man, accompanied by the supervisor, got off the car and walked to the curb. The witness stated that the car remained at Howard Street for about 5 minutes before proceeding south; that the man did not ride back with him in a southerly direction. Curry, the supervisor, testified that he boarded the car at Devon Avenue, at which time the man was standing on the rear platform against the rear control; that he endeavored unsuccessfully to obtain the name and address of the man; that when the car arrived at Howard Street, the man and witness got off the car; that the man was not assisted in getting off the car; that both of them walked to the sidewalk, and that they rode back south on the same car. It will be recalled that the conductor testified that the man did not ride back on the same car. Curry further testified that on the return trip, he got off the car at Devon Avenue; that the police were called and that in about 10 minutes a police vehicle arrived, which took the man to the Rogers Park Hospital; that at the time the police arrived, the man was standing on the street; that the witness went to the hospital and remained there about one half hour; that during the time he was at the hospital, the police were unable to learn the man's name or address. On cross-examination, he stated that when the man arrived at the hospital "they took off his cap" and he noticed a laceration on the head under the cap. Elmer McKenna, the motorman, testified that his car came to a stop alongside of the safety island at the time the signal governing traffic on Western Avenue was turning red; that the car stood there about 30 seconds; that when the car came to a stop, there was a man standing

testate in an endeavor to identify that car, one could understand what the man was saying to the officer; that the car stopped at Seven Corners, which is 1600 north, where a motorist named Frank Curry, got out; that Curry went to the end of the line to Grand Street, which is 7000 north; that he tried to talk to the man; that at Grand Street, the man, accompanied by the conductor, got off the car and walked to the rear. The witness stated that the car remained at Grand Street for about 5 minutes before proceeding south; that the car did not pick up with him in a northerly direction. Curry, the motorman, testified that he searched the car at Seven Corners, at which time the man was standing on the front platform; that Russell had approached and conversed with the man; that the man admitted to the man that he had shot the car driver. The man and witness got off the car; that the man was not molested in getting off the car; that both of them walked to the sidewalk, and that they turn back south on the same car. It will be recalled that the motorman testified that the man did not ride back on the same car. Curry further testified that on the return trip, he got off the car at Seven Corners; that the police came called and that in about 5 minutes a police vehicle arrived, which took the man to the County Jail; that at the time the police arrived, the man was standing on the street; the witness was in the hospital and remained there about one half hour; that during the time he was at the hospital, the police were unable to learn the man's name or address. On cross-examination, he stated that when the car arrived at the hospital they took off his cap and he noticed a laceration on the head under the cap. Elmer Mathews, the motorman, testified that his car came to a stop alongside of the entry island at the time the signal governing traffic on Western Avenue was turning red; that the car stopped where about 10 seconds; that when the car came to a stop, there was a man standing

on the safety island, opposite the exit door, which was at the place where the motorman was located; that the signal light turned green; that he received the bell signal to proceed; that when he received the bell signal the man was standing in the same position; that the man gave me indication that he wanted to board the car; that after receiving the signal, witness started the car in a northerly direction; that after it was started he received three "slow bells", whereupon he pulled across the street and stopped; that he got out and that he saw a truck stopped "in the middle of the safety island"; that he then saw a man standing on the safety island; that he recognized him as the same man who was standing in front of the exit door while the car was stopped; that the man walked alongside of the conductor from the safety island to the rear platform of the car; that the supervisor got on the car at Devon Avenue; that the supervisor and the man got off at Howard Street; that was the last he saw of the man; that the car was in good operating condition; that in starting the car at Western and Montrose Avenues there were no jerks or lurches. The policeman testified that he boarded the car at the point where the elevated road crosses Western Avenue; that he was in uniform; that his attention was called to the man on the rear platform; that the man was standing; that "he did not speak to me in the American language"; that he did not find anything on the man by which to identify him.

Walter Haening, an eye-witness, who testified for plaintiff, stated that he was 48 years of age, and married, and at the time of the occurrence he was selling kitchen utilities from house to house; that he was riding on the rear platform of the street car; that he was the only passenger on the car; that the conductor was in his usual place on the platform, and that he, the witness, was facing toward the entrance; that the car stopped at Montrose Avenue; that "this old gentlemen got on while he was standing on the safety

on the safety island, opposite the exit door, where one of the
clerks where the motorman was located; that the signal light showed
green; that he received the bell signal to proceed; that when he
received the bell signal the man was standing in the same position;
that the man gave no indication that he wished to board the car;
that after receiving the signal, without stopping the car in a
southerly direction; that after it was started he received three
"alar bells", whereupon he pulled across the street and stopped;
that he got out and that he saw a truck stopped "in the middle of
the safety island"; that he then saw a man standing on the safety
island; that he recognized him as the same man who was standing
in front of the milk depot while the car was stopped; that the man
raised simultaneously of the conductor from the safety island to the rear
platform of the car; that the motorman got on the car as it crossed
Lincoln; that the conductor and the man got off at Sheridan Street;
that was the last he saw of the man; that the car was in good mech-
anical condition; that it carried the car of passengers and therefore
required more than an hour to operate. The plaintiff testified
that he boarded the car at the point where the alleged head injuries
occurred; that he was in uniform; that his attention was
called to the man on the truck; that the man was standing
when "he did not speak to me in the American language"; that he did
not find anything on the man by which to identify him.

Walter Manning, an eye-witness, who testified for plaintiff,
stated that he was 44 years of age, and married, and at the time
of the occurrence he was selling tickets from house to
house; that he was riding on the rear platform of the street car;
that he was the only passenger on the car; that the conductor was
in his usual place on the platform, and that he, the witness, was
talking to the conductor; that the air whistle of a passing automobile
caused the motorman; that the air whistle on the safety
island "blew six times and he was standing on the safety

island, at that time, so he was, he got on the car; well he was trying to get on the car; of course, he got one foot on the running board, and he was reaching for the bar, to hold onto, and the car started off and down he went on his back. Nobody else was trying to get on the street car, he was the only one, nobody was behind him. That was all the passengers I saw. As to whether the car started with a sudden movement or not, he started the car in the regular way and the old man slipped so it passed the cross line and then he stopped the car. This man slumped down onto the safety island. His head, I suppose, came in contact with the safety island, that is the way it looked. It looked like he came down on his back. It looked like he was attempting to board the extreme north end of the entrance. The weather condition that day was dry. From the time that the street car came to a stop until it started up, the conductor was standing at the place where he was supposed to. He was facing toward the south. There are two doors. He was standing in between the two doors in the space where he is supposed to. He was between the two doors all the time from the time the car came to a stop until the time it started up. I told him there was something wrong. I don't know if he noticed it or not. The street car went all the way across Montrose Avenue before it stopped." In answer to the question as to what the conductor said when the witness told him there was something wrong, he answered, "This is a fake. I said, just a minute, there is something wrong with this man, and he said, No, that is only his makeup, that is only faked." Witness further testified that "after the accident occurred, the man was facing north toward the car, coming toward the car, right by the rear platform. He was on the safety island. No part of his body was on the street. I did not know this man. I believe I gave my name to the conductor. A few days after this occurrence somebody from the street car company

came out to see me. Nobody notified me to appear at the inquest. After the conductor stopped the car, he went back to the place where he fell off and picked him up, he and a truck driver, brought him back on the car, on the platform. The conductor did not pick him up alone, he had someone to help him. I do not know who that man was. I saw blood spots on this man's overcoat after he was picked up. That man left the street car at Western and the Ravenswood L station. He left the car alone. I did not see a police officer at any time." On cross-examination, he testified that the car came to a stop at the regular place; that he did not pay any attention to the stop lights; that the car came to a dead stop; that when the car came to a dead stop he saw the man "out on the safety zone"; that before the car stopped it slowed down gradually; that there was nothing unusual about the stop; that "when the car came to a stop, I saw the man out on the safety island. He was where he was supposed to be by the rear platform. I couldn't tell you how far he was from the front end of the car. When I first saw this man he was standing facing the car. The conductor looked out. When he looked out, he looked along the side of the car. I noticed the conductor do that. Q. Then when the conductor was looking out, was the man getting up on the car? A. No. Q. He was not, was he? A. No, sir. Q. He did not try to get up on the car until the car started, did he? A. He had one foot on the car. Q. Did he take hold of the car at all until the car started? A. As soon as the conductor gave the bell, see, he had one foot and was grabbing for the handle. Q. But he did not touch the handle at all, did he? A. No. Q. He didn't do that until after the car started, did he? A. Just about. The car was not started up for some time before he attempted to board it, he was right there. The conductor looked out. He didn't move out to the edge of the car to look out. I don't know whether he could

also but to see me." Nearly motioned me to sit-down at the lounge.

After the conductor opened the car, he went back to the phone where he still sat and picked his up. He was a tall fellow, brought his back to the car, on the platform. The conductor did not pick his up place, he had somewhere to help him. I do not know who that man was. I saw blood stain on this man's overcoat after he was picked up. That man left the street car to nearby and the newspaper I reading. He left the car alone. I did not see a police officer at my time." On cross-examination, he testified that the car came to a stop at the regular place; that he did not pay any attention to the stop lights; that the car came to a full stop; that when the car came to a dead stop he saw the man "sit up the street" quite; that before the car stopped it slowed down gradually; that there was nothing unusual about the stop; that when the car came to a stop, I saw the man out on the safety island. He was white he was supposed to be by the rear platform. I couldn't tell you how far he was from the front end of the car. When I first saw him he was standing facing the car. The conductor looked out. When he looked out, he looked along the side of the car. I noticed the conductor do this. Q. Then when the conductor was looking out, was the car rolling on at the stop? A. No. Q. He was not, was he? A. No, sir. Q. He did not try to get off on the car until the car started, did he? A. He had one foot on the car. Q. Did he take hold of the car at all until the car started? A. As soon as the conductor gave the bell, and, he had one foot and was grabbing for the handle. Q. And he did not touch the handle at all, did he? A. No. Q. He didn't do that until after the car started, did he? A. That stack. The car had started on for such time before he attempted to board it, he was right there. The conductor looked out. He didn't come out on the edge of the car to look out. I don't know whether he could

see along the side of the car or not. He didn't put his head out of the side of the car. He looked out, I didn't say he stuck his head out. I was not talking to the conductor at that time. There was no one on the back platform talking to him. As far as I know, he seemed to be attending to his business." Witness further stated that three days after the accident, an investigator for the defendant, named Marcus, called on him; that the investigator wrote out a statement in answer to questions. Witness further testified as follows: "Q. Did you tell Mr. Marcus, 'And this man stepped up on the car step,' did you tell him that, 'And this man stepped up on the car step with one foot and reached for the grab handle'? A. Yes, sir. Q. Did you tell Mr. Marcus that after the car started the man put his foot on the step? A. That is the same question again, I said yes. Q. You told him that, didn't you? A. Yes, sir. Q. [Attorney for plaintiff] Did you understand the question? A. Certainly, that is the same question he is asking for the second time, isn't it? Q. [Attorney for plaintiff] That is a different question. A. A different question? [Attorney for plaintiff] You listen to what is asked you. The witness says this is the same question you asked him before, and Mr. Green [Attorney for defendant] said yes. [Last question read.] A. Yes. Q. That was true, wasn't it? A. Yes, sir. Q. When he fell off the car, the car was moving, wasn't it? A. Yes, about started up, well, just about moving. Q. When he fell off the car the car was moving, wasn't it? A. Yes, it started to start off." He testified further that "when he fell off the car, the car was moving, just started up, just about moving. When he fell off the car, the car was moving. It was not standing still when he fell off or he would have been down on the ground. * * * At the time the car started up when it was south of Montrose, it started up in its usual way. I did not notice any unusual jerk or motion about it. When the car

was along the side of the car or not. Or didn't you hold out of the side of the car. Or looked out, I didn't say do you think you did. I was not talking to the motorman at that time. There was no one on the back platform talking to him. As far as I know, he seemed to be attending to his business." Counsel further stated that three days after the accident, in investigating for the defendant, Bennet Stevens, called on him and the investigator made an affidavit in answer to questions. Counsel further testified as follows: "Q. Did you tell Mr. Stevens, that this man stepped up on the car away, did you tell him that, that this man stepped on the car step with one foot and reached for the pole handle? A. Yes, sir. Q. Did you tell Mr. Stevens that after the car started the man put his foot on the step? A. That is the same question again, I said yes. Q. You told him that, didn't you? A. Yes, sir. Q. [Attorney for defendant] Did you understand the question? A. Certainly, that is the same question as it stands for the second time, isn't it? Q. [Attorney for plaintiff] Put to a different question. A. A different question? [Attorney for plaintiff] Yes. Listen to what I ask you. The witness says this is the same question you asked him before, and Mr. Stevens [Attorney for defendant] asks you. [Last question read.] A. Yes. Q. That was true, wasn't it? A. Yes, sir. Q. When he fell off the car, the car was moving, wasn't it? A. Yes, about started up, yes, just like moving. Q. Does he fall off the car the car was moving, wasn't it? A. Yes, it started to move off." Defendant further that when he fell off the car, the car was moving, just started up, just about did so. Then he fell off the car, the car was moving. It was not standing still when he fell off or he would have been lost in the ground. . . . At the time the car started by there is two kinds of motions, it started up in its usual way. I did not notice any unusual jerk or motion about it. Then the car

came to a stop with the rear end north of the street car tracks of Montrose, the conductor got off the car and went back to the place. I stayed on the rear platform. I saw the conductor get off the platform and go back to where the man was lying in the street. Q. And the man was lying in the street near the sidewalk on the south side of Montrose Avenue? A. That is correct. Q. Is that correct? A. Right. Q. Right near the sidewalk on the south side of Montrose? A. That is correct. Q. He was lying on the north bound track at that time? A. Yes, sir. Q. That would be right behind where the street car was? A. Yes. Q. That is, the street car was across the street and he was on the south side of Montrose? A. Sure." Witness stated that "he was in pretty bad condition when he was put on the car. When he got on the car I noticed some blood on his coat. It appeared fresh to me. I did not tell Mr. Marcus that it looked like old blood. I told him there was blood on the coat. * * * I got off at Lawrence and Western. After the man got off the car he stood up on the rear platform, holding on to that round bar. * * * It appeared to me as if he was talking in a foreign language." Witness further testified that he heard the conductor endeavoring to ascertain the man's name. The statement given to the investigator was introduced in evidence. In the statement to the investigator he said: "I was standing on the rear platform of the north bound Western Ave. street car, and when the car was at Montrose Ave. and Western Ave. the car came to a stop, and when the light changed to green the car started up and this man stepped up on the car step with one foot and reached for the grab handle, but did not get hold of the grab handle, and he fell to the car platform and rolled off in the street on his back. The car came to a stop across the street and the conductor went back and helped the man up and put him on the car.

Shaw is also with the Prior and south of the street my tracks of instance, the conductor got off the car and came back to the place. I arrived on the rear platform. I saw the conductor put off the platform and go back to where the man was lying in the street. He had the man was lying in the street near the sidewalk on the south side of Montrose Avenue? A. That is correct. Q. Is that correct? A. Right. Q. Right near the sidewalk on the south side of Montrose? A. That is correct. Q. Do you lying on the north bound track at that time? A. Yes, sir. Q. That would be right behind where the street car was? A. Yes. Q. That is, the street car was across the street and he was on the south side of Montrose? A. Sure."

Witness stated that "he was in pretty bad condition when he was put on the car. There he was on the car I noticed some blood on his face. It appeared though to me. I did not call it. Person that it looked like old blood. I said he there was blood on the back. " " " I put off at Lawrence and Damen. After the man got off the car he stood on the rear platform holding on to this round bar. " " " It appeared to me as if he was raising in a foreign language."

Witness further testified that he heard the conductor endeavoring to ascertain the man's name. The statement given to the investigator was introduced in evidence. In the statement to the investigator he made: "I was standing on the rear platform of the north bound railway car. Street car, and when the car was at Montrose Ave. and Damen Ave. the car came to a stop, and when the light changed to green the car started up and this man slipped up on the car step with one foot and reached for the grab handle, but did not get hold of the grab handle, and he fell to the car platform and rolled off in the street on his back. The car came to a stop opposite the street and the conductor went back and helped the man to get off and put him on the car.

This man could not talk English good. I did notice on the shoulder of this man's overcoat blood and it looked like it was old blood, not fresh blood. The man got off the car at Lawrence Ave. Station of the Elevated Road. That is all I can say. The car step was in good condition as far as I could see." Robert C. Unangst, a witness for plaintiff, testified that he was a truck driver; that he was not an eye witness to the occurrence; that the first knowledge he had of any accident was when he found "the man lying in north bound rail of the Western Avenue street car tracks; he was approximately in the center of the safety island;" that when he saw the street car, it was pulling away from the safety island at a speed of not more than ten miles an hour; that the conductor ran back and helped the witness pick the man up; that the witness left the man standing on the safety island with the conductor.

All the witnesses agree that the street car came to a full stop. There is no contention that it started suddenly or violently. Plaintiff's witnesses testified that it started in the regular way. It was incumbent upon plaintiff to prove that when the conductor sounded the bell to start the car, he knew or he had reasonable means of knowing, that Miglioriai intended to board the car. We agree with defendants that no one can be charged with a failure to perform a duty unless it is shown that the circumstances are such that he has time and opportunity to become conscious of the facts giving rise to the duty and a reasonable opportunity to perform it. (Growdy v. Chicago Union Traction Co., 206 Ill. 615, 618; Letugh v. New York Central R. R. Co. 267 Ill. App. 536, 537). If the conductor knew, or, in the exercise of ordinary diligence, should have known that Miglioriai was approaching the entrance of the car with the intention of boarding it, and he (the conductor) gave the bell signal to start the car so that the car did start while he, Miglioriai, was in the

this man could not take English money. I did notice on the obverse of this man's commission bond and it looked like it was old blood, not fresh blood. The man got all the cut of a lawyer's, stating of the different fees. That is all I can say. The bar exam was in good condition so far as I could see." Judge T. Dunlap, a witness for plaintiff, testified that he was a trial lawyer; that he was not an eye witness to the occurrence; that the first knowledge he had of any problem was when he found "the man lying in front bowl of the lavatory (sic) where his trousers in the [illegible] in the center of the entry hall." Dr. Dunlap, a witness for defendant, testified that the man "was lying in front of the door, it was pulling away from the entry hall at a angle of not more than ten miles an hour; that the conductor was back and behind the witness; that the man was; that the witness left the car stepping on the entry hallway with the conductor.

All the witnesses agree that the street car came to a full stop. There is no evidence that it started suddenly or violently. Plaintiff's witnesses testified that it started in the regular way. It was immaterial whether plaintiff was injured by the conductor assuming the fall to alert the car, he knew or he had reasonable cause of knowing, that plaintiff intended to board the car. In cases with defendants that he was one who be charged with - Failure to perform a duty owing; it is shown that the circumstances are such that he has had opportunity to impose conditions of the trade giving rise to the duty and a reasonable opportunity to perform it. (Dennis v. Chicago Union Traction Co., 208 Ill. 618, 624; Lynch v. Sun Ins. Office, 6 F. 2d, 347 Ill. Dec. 814, 817). If the conductor knew, or in the exercise of ordinary diligence, should have known that plaintiff was attempting the entrance of the car at the risk the intention of boarding it, and he (the conductor) gave the bell signal to start the car so that the car did start while he, plaintiff, was in the

act of boarding it, clearly defendants would be guilty of negligence which would be the proximate cause of the death. Manning, the witness who testified in behalf of plaintiff, obviously had difficulty in understanding the questions and in making his answers understandable. However, he did testify that the man was endeavoring to board the car and that he was reaching for the grab handle when it started. He also testified that at the time the car started, the man had one foot on the step of the car. At another point in his examination the witness stated that the deceased attempted to board the car while the car was moving. It will also be observed that Robert Unangst, who was called by plaintiff, testified that he was driving his truck to the right of the safety island, that he saw the injured man lying in the street car tracks, and that the man was approximately in the center of the safety island. The safety island is 100 feet in length. The center of the island would be approximately 51 feet from either end. The motorman testified that the car stopped with the front end close to the north of the safety island. The street car is approximately 48 feet in length. The testimony of the truck driver would, therefore, tend to corroborate Manning's testimony that the deceased attempted to board the car just before it started. If the conductor was watchful, it is difficult to understand why he did not signal the motorman to stop immediately. Under all of the circumstances, the jury was presented with a question of fact. We would not be warranted in disturbing the verdict by finding, as a matter of law, that there is no evidence to support plaintiff's case.

Finally, defendants maintain that the court erred in giving (at plaintiff's request) the following instruction:

> "If you find from a preponderance of the evidence under the instructions of the Court that Ignazio Miglioriai, deceased, was a passenger at the time in question, then you are instructed that

all of herself, is, clearly testimony would be guilty of negligence which would be the proximate cause of the death. Finally, the witness was testified in behalf of plaintiff, obviously not difficulty in understanding the questions and in making his answers understandable. However, he did testify that the man was endeavoring to board the ship and that he was running for the gang bridge when it started. He also testified that at the time the car started, the man had one foot on the step of the bar. At another point in the examination the witness stated that the deceased attempted to board the car while the car was moving. It will also be observed that Walter Swanger, who was called by plaintiff, testified that he was driving his truck to the right of the safety island, that he saw the injured man lying in the street near trucks, and that the man was approximately in the center of the safety island. The safety island is 100 feet in length. The center of the island would be approximately 50 feet from either end. The witness testified that the car stopped with the front end close to the center of the safety island. The street car is approximately 50 feet in length. The testimony of the train driver would, therefore, tend to corroborate Swanger's testimony that the deceased attempted to board the car just before it started. If the motorman was blinded, it is difficult to understand why he did not signal the motorman to stop immediately. Under all of the circumstances, the jury was presented with a question of fact. We could not be warranted in disturbing the verdict by finding, as a matter of law, this there is no evidence to support plaintiff's case.

Finally, defendants contend that the trial court erred in giving the plaintiff's request for the following instructions:

"If you find from a preponderance of the evidence under the instructions of the Court that Lucile Williams, deceased, was a passenger at the time in question, then you are instructed that

it became and was the duty of the defendant to do all that human care, vigilance and foresight can reasonably do under the circumstances, and in view of the character and the mode of evidence adopted, consistent with the practical prosecution of its business, reasonably to guard against accidents and consequential injuries to Ignazio Miglioriai and if you believe from the evidence that they neglected so to do, they are to be held strictly responsible for all consequences which directly flow from such neglect, if any, provided such neglect and consequences are alleged in the complaint and are proven by a preponderance or greater weight of the evidence; that while the carrier is not an insurer of the absolute safety of its passengers, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of its passengers and is responsible for the slightest neglect directly resulting in death to its passengers provided such neglect and consequential death are alleged in the complaint and are proven by a preponderance or greater weight of the evidence, if the passenger is at and before the time of the occurrence in question exercising ordinary care for his own safety, and his heirs and next of kin at and before the occurrence in question were in the exercise of ordinary care for the safety of Ignazio Miglioriai, deceased."

It is conceded that the use of the phrase, "in view of the character and mode of evidence adopted", was an inadvertence, and that it was intended that the word "conveyance" should be used instead of the word "evidence". Defendants insist that nevertheless the result was that the correct qualification was not given to the jury, and that the qualification contained in the instruction was confusing, misleading, meaningless and entirely erroneous. Defendants also criticise the instruction for telling the jury that the carrier "is responsible for the slightest neglect directly resulting in death to its passengers." The rule that a carrier is not an insurer of the safety of the passengers is a limitation on the rule of highest degree of practicable care. We are of the opinion that the part of the instruction which told the jury that the carrier is responsible for the slightest neglect was calculated to minimize the non-insurer rule and to encourage the jury to extend the highest degree of care rule to the prejudice of defendants. (Lebber v. Chicago City Railroad Co. et al., 287 Ill. App. 605, (Abst.); Otto v. Richardson, et al., 274 Ill. App. 649, (Abst.) The two objections to the instruction are

valid. There being a sharp conflict in the evidence on the question of liability, it was essential that the jury be properly instructed. Because of the error in giving the instruction, the judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

304 Ill. App.

41036

JAMES HARRIS doing business as HARRIS ELECTRIC SUPPLY CO.,

Appellee,

v.

G. M. McKNIGHT doing business as G. M. MANUFACTURING CO.,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 592

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On May 10, 1939, plaintiff filed his statement of claim in the Municipal Court of Chicago, and alleged that on April 10, 1939, he sold and delivered to defendant the goods and merchandise set out in a bill of particulars, and that the reasonable value thereof was $135.38, for which he asked judgment. The bill of particulars, dated April 10, 1939, recited that plaintiff sold to defendant: "1 Installation $14.00; 1 Spray Booth $60.00; 2 Spray Booth Fans at $35.00, $70.00; 2 1-4. P. 3 phase Ball Bearing Motors at $28.84, $57.68, or a total of $135.38." Defendant filed an affidavit of merits and a counter claim. The affidavit of merits asserted that on or about March 1, 1939, defendant secured from plaintiff an estimate for the installation of a certain spray booth, together with the necessary electrical equipment, to be installed at the Pyle-National Metal Manufacturing Company, Chicago; that the proposal was accepted by defendant and that he ordered plaintiff to deliver and install at the plant of said corporation 1 Spray Booth, 6 feet deep, 6-1/2 feet high, 12 feet long, complete with 2-24 inch fans, and 2-1 horse power 3 phase Ball Bearing Motors; that the price of the equipment installed to be charged to the corporation was to be $213.38; that the billing to the defendant was to be for $195.38, leaving a profit or commission of $18.00; that the equipment was delivered and the spray booth installed by plaintiff on or about April 10, 1939, but that the spray booth was not installed in

accordance with the specifications agreed to by the parties and by the purchaser, Pyle-National Metal Manufacturing Company; that the spray booth and equipment were rejected by the corporation, which refused to pay for the same and demanded the removal thereof from their factory; that on or about April 11, 1939, defendant, accompanied by plaintiff, called at the factory of the corporation; that plaintiff then admitted to the manager of the plant that the installation was faulty; that shortly thereafter plaintiff dismantled and took back the equipment, but refused to dismantle the spray booth; that it became necessary for defendant, at his own expense, to dismantle the spray booth. The counter claim repeats the charges of the affidavit of merits and asks damages against plaintiff of $10.00 for dismantling the spray booth; $6.35 for drayage; $18.00 for loss of profit, and $50.00 for loss of 5 days' time in his regular business, or a total sum of $84.35. The case was tried before the court without a jury and resulted in a finding and judgment against defendant in the sum of $195.38, and this appeal followed.

Pyle-National Metal Manufacturing Company has a plant located at 1334 North Kostner Ave., Chicago. Marion T. Scott was the General Superintendent of the plant. George McKnight, defendant, operated a small shop at 216 North Clinton Street, Chicago, under the name of G. M. Manufacturing Company. He manufactures spray guns, which are used for applying paint by a forced spray method. Plaintiff, James Harris, opened a small shop at 548 West Lake Street, Chicago, in the early fall of 1938, under the name of Harris Electric Supply Company. The two shops are around the corner from one another. Plaintiff and defendant became acquainted. They were not in competitive lines. Defendant was endeavoring to procure an order from the Pyle Corporation for spray gun equipment. Plaintiff testified that on March 31,

complying with the specifications agreed to by the parties and by the jurisdiction, Kyle-Stokes Acid Manufacturing Company, that the spray booth and equipment were purchased by the corporation, which refused to pay for the plan and invoiced the remaining balance from their factory; that on or about April 12, 1928, defendant, representing by plaintiff, called at the factory of the corporation; that plaintiff then admitted to the manager of the plant that the installation was faulty; that shortly thereafter plaintiff dismantled and took back the equipment, but refused to dismantle the spray booth; that it became necessary for defendant, at his own expense, to dismantle the spray booth. The counter claim reports the storage of the effects of suits and sale thereof against plaintiff of $4,50 for dismantling the spray booth; $4,75 for storage; $25.00 for loss of profit, and $80.00 for loss of 8 days' time in his regular business, or a total sum of $94.25. The case was tried before the court without a jury and resulted in a finding and judgment against defendant in the sum of $19.25, and this appeal follows.

Kyle-Stokes Acid Manufacturing Company has a plant located at 1124 North Dearborn ave., Chicago. Prior to, there was the usual departments of the plant. George Kenyon, defendant, operated a small shop at 124 North Clinton Street, Chicago, under the name of G. K. Manufacturing Company. He manufactures spray guns, which are used for applying paint by a forced spray method. Plaintiff, James Kavis, opened a small shop at 224 East Lake Street, Chicago, in the early fall of 1928, under the name of Kavis Electric Supply Company. The two shops are around the corner from one another. Plaintiff and defendant became acquainted. They were not in competitive lines. Defendant was endeavoring to secure an order from the Kyle Manufacturing Company for spray gun equipment. Plaintiff testified that on March 12,

1939, defendant gave him a written order, reading: "Dear Mr. Harris: Please enter our order for, 1 spray booth 6 feet deep 6-1/2 ft. high and 12 feet long complete with 2-24" fans 2-1 horse power 3 phase 1800 R.P.M. motors. Please deliver the above not later than April 6-1939." He further testified that he complied with the order and completed the work; that after the work was completed defendant had the material removed from his shop; that plaintiff did not know the name of the plant to which the material was taken. Plaintiff identified an exhibit which showed the receipt of the equipment by the Pyle corporation on April 10, 1939. He also testified that on April 10, 1939, he sent a bill to defendant which reads: "1 Installation 13.00; 1 Spray Booth 60.00; 2 spray booth fans, 35.00, 70.00; 2 1-H. P. 3 phase Ball Bearing Motors, 26.64, 53.28, total $195.28." He stated that he had made five or six spray booths for defendant prior to the instant transaction, and that on none of the orders was there any mention as "to who the work was for"; that in each case defendant gave the dimensions. On cross-examination, he could not remember whether the two parties had a conversation about March 1, 1939, in which defendant stated in substance that he expected to secure an order for a spray booth. In answer to an interrogatory as to whether defendant did submit to him certain specifications for the installation of a spray booth at the Pyle corporation, he answered, "It is all right there." Plaintiff was shown an exhibit and asked whether the same did not constitute a quotation furnished on March 3, 1939, and answered in the affirmative. The exhibit reads: "1 6 ft. deep 6-1/2 feet wide and 12 feet long Spray Booth complete with 2 24" fans, 2-1 Horse Power 3 phase 1800 R. P. M. motors. $213.00. Delivered. $12 extra for installation." He stated that he also quoted $12.00 additional for installation, and that the $13.00 was for the assembly job. On cross-examination,

1.00, Johnson gave him a quizzic smile, replying: "Now so, Martin; please order our order for, I study boats 8 feet long 8-1/2 ft. high and 11 feet long complete with 5-hp' from 1-2 horse power 2 cycle 1800 R.P.M. motors. Please deliver the above and later then April 8-2324." He further instructed that be commenced with the order and completed the work; that after the work was completed detailed and the material received from his shop; that yesterday did not know the name of the plant to which the material was taken. Plaintiff identified an exhibit which showed the receipt of the consignment by the rjle corporation on April 10, 1.00. He also testified that on April 10, 1.00, he sent a bill to defendant which reads: "1 Installation 10.00; 1 Power Boat 80.00; 1 spray boats from, 10.00, TC.00; 2 2-hp. 1, 2 phase Oil Burning Motors, 00.00, 00.00, total 1100.00." He stated that he had made two or six spray boats for defendant prior to the instant transaction, and that on none of the orders was there any mention as "to who the next was for; that in each case defendant gave the directions. On cross-examination he could not remember whether the two orders had a conversation about March 1, 1.00; he also testified upon in substance that he expected to receive an order for a spray boats. It appears to be interrogatory as to whether defendant had submit to him certain specifications for the installation of a spray boats or the rjle corporation, he answered, "It is all right there." Plaintiff was shown an exhibit and asked whether the same did not constitute a quotation furnished on March 1, 1.00, and answered in the affirmative, the exhibit reads: "1 8 ft. Scow 8-1/2 feet wide and 11 feet long spray boats complete with 5 hp. 2-2 horse power 2 phase 1800 R. P. M. motors. 1100.00. Delivered. Ex extra for installation." He stated that he also sended 110.00 additional for installation, and that the 110.00 was for the assembly job. On cross-examination,

plaintiff also testified that his own men installed the spray booth; that they erected it and put it together. He also testified as follows:

"Q. Didn't Mr. Scott come out to the job in the presence of Mr. McKnight and yourself say this doesn't work?
"A. No, he called my attention to it after it was finished.
"Q. Didn't you ask permission to complete it?
"A. Yes, sir, I was told to complete it."

He stated that after the job was completed he did not go out to the Pyle corporation plant until he was so requested by defendant; that "he [defendant] called me in the office and asked me to see a man by name of Mr. Scott and he started to tell me what sort of a poor job it was and I brought him back." Plaintiff testified that he did not offer to make any repairs and that the motors were in his (plaintiff's) shop. He stated that he did not bring the motors back but "somebody brought them in there". He further stated that the motors were procured by him on special orders for that job.

Defendant testified that he called on plaintiff at the latter's shop on March 21, 1939, and told him that he had a chance to get a large spray booth job; that he would give the dimensions and wanted a figure on the job; that it was understood that the "booth had to be right"; that the people who wanted it were particular, and that it had to stand a rigid test; that when the price was submitted, he (defendant) would add $18.00 for his commission; that they figured out the job as disclosed by the exhibit; that he, defendant, added $18.00 for his commission; that under the conditions stated, plaintiff accepted the job; that it was understood between the parties that the bill from plaintiff was going to defendant; that defendant was then to make up another bill on his own letterhead; on which he would add on his commission of $18.00, and forward to the Pyle corporation; that about five days later he came back and gave the order to plaintiff; that plaintiff informed him (defendant)

plaintiff also testified that his son was installed the survey boat; that they worked it and was in Saginaw. He also testified as follows:

"Q. Didn't do, didn't speak out to the job in the presence of Mr. Gardiner and Wheatcroft and this Brown's world?
"A. No, he walked up afterwards to it after it was finished.
"Q. Didn't you not introduction to monsieur Ir?
"A. Yes, sir, I was kind to monsieur Ir?

He stated that after the job was completed he did not go out to the site navigation plans that he was to represent to Gardiner; that [Gardiner] helped us in the office and taken on by one of us. Boats and be started to sell on work east of a place job is and isn't I bought this boat." Plaintiff testified that he did not offer to make any repairs and that the motors were in his (plaintiff's) shop. He stated that he did not bring the motors boat but "somebody brought them in there". On further stated that the motors were removed by him on several occasions for their job.

Gardiner testified that he noticed no plaintiff in the letter's shop on March 14, 1929, and said his brother he had a dispute on the job; that he would give the dissatisfaction that would allow the job; that it was understood that the though not as to which the people who worked in some jurisdiction; and that is not to stand a little boat; that then the time was completed, he [Gardiner] would pay $18.00 for his assistant; that they finished out the job as directed by the original plan so, Gardiner, added $18.00 for his assistant that under the modification stated, plaintiff assumed the job; that is the understood between the parties that the bill-form plaintiff was going to furnish that Gardiner and some be made on another bill on his own letterhead; he stated he would bill on his commission of $18.00, and turned to Gardiner and plaintiff the bill-form plaintiff was going to furnish the job; Gardiner and plaintiff assumed that the bill was made on his own letterhead; the plaintiff also testified that the bill was made on the letterhead of Gardiner; that plaintiff also testified that his son was installed the survey boat

that the spray booth would pass inspection and "be up to specifications and Mr. Scott will like it and he said if it isn't right he won't have to pay for it"; that four or five days later plaintiff ordered the material; that later, defendant was informed that the spray booth was ready to be delivered, and he (defendant) called a drayman and ordered the equipment delivered to the Pyle corporation; that after the equipment had been delivered, plaintiff began to install the booth; that Mr. Scott called the defendant in and stated that he wasn't satisfied with the job; that defendant called plaintiff and after defendant had pointed out the faults to plaintiff, the latter said: "When this booth goes up Mr. Scott will like it and it will be one hundred percent according to specifications;" that plaintiff completed the job; that Mr. Scott, the plant superintendent of the Pyle corporation, said to plaintiff: "This is the lousiest job a mechanic ever put up; it won't do for my place; it is a disgrace;" that Scott ordered that the booth and equipment be removed from the plant; that plaintiff drove defendant back to his shop and on the way quoted plaintiff as saying "he was sorry it happened and he could sell the fans and three or four days later he went up and took his fans out and I asked Mr. Harris when he was going to take the rest out and he said he had spent too much time and labor now, to shove it aside." Plaintiff then sent a bill to defendant, about the same as the one set up in the bill of particulars. Defendant stated that plaintiff took the fans and the motors to his shop, but refused to take the spray booth; that defendant hired a drayman to take the spray booth, which he delivered to plaintiff's shop. Plaintiff refused to accept it. On cross-examination, defendant stated that plaintiff had built four spray booths for him during a period of eight months. He also admitted that plaintiff did not know where the spray booth was to be delivered until it was completed.

Marion W. Scott testified that he was the General Superintendent of the Pyle plant; that during the progress of the work he had a conversation with plaintiff and defendant and told them that the equipment installed was not satisfactory; that "it was a lousy piece of work;" that it was a bad piece of workmanship; that plaintiff advised him to wait until the job was finished, which he did, and let them proceed. He further testified that he waited until it was finished and that he told both parties that "it was a lousy, rotten piece of workmanship, and I refused to accept it." He stated that he told plaintiff that the booth was 8 inches short of specifications; that "the top was sagging down, there was holes all the way through it, where they had missed the screws; that the sills weren't tracking, they weren't put on the job properly." Witness further testified that after he complained about the work, plaintiff walked out of his office and that he did not offer to do the work over; that the motors were taken out by the men who installed them, who were men employed by plaintiff; that defendant's men later dismantled the spray booth and took it away. On cross-examination, he stated that he gave the order for the spray booth and equipment to defendant and that he did not come in contact with plaintiffs until the installation commenced

At the outset, defendant inquires as to whether the negotiations and transactions between plaintiff and defendant constitute a contract between them for the benefit of a third party. While the court did not make any specific finding on that proposition, the fact that judgment was rendered against defendant indicates that the court did not consider that the contract was for the benefit of a third party.

The second proposition urged by defendant is that if the contract was between plaintiff and defendant, nevertheless, plaintiff failed to construct the spray booth in accordance with the specifications and dimensions, and, in fact, constructed it in an unworkmanlike

manner, and that because of such failure plaintiff was not entitled to recover, but defendant was entitled to damages on his counter claim. Plaintiff maintains that the secret intentions of the parties cannot prevail as against their real intentions as expressed in the agreement. A consideration of the record convinces us that the letter dated March 31, 1939, from defendant to plaintiff does not constitute the entire agreement. While at the time the order for the spray booth was given plaintiff did not know where it was to be installed, he did know that defendant was having the same constructed and installed for a third party. Part of the agreement of the parties was that plaintiff would go to the plant and install the booth. Plaintiff did install the booth. He admits that in estimating the job he charged $12.00 additional for installation. The letter of March 31, 1939, on which plaintiff relies, does not say anything about installation. Defendant hired a drayman, who took the parts of the booth and the motors and fans to the plant of the Pyle corporation. Thereafter, workmen employed by plaintiff constructed the booth. Mr. Scott, a disinterested party, rejected the booth because it was 8 inches short of specifications, the top was sagging, there were rivet holes all through it where the riveter had missed the screws, and the sills were not tracking as they were not put on properly. In very forceful language, which we have quoted, he said that the job was done in a very unworkmanlike manner. Plaintiff did not take the stand to rebut any of the testimony given by Mr. Scott. The latter ordered the booth and other equipment taken away from the plant. The motors and fans were removed by plaintiff and the spray booth was removed by defendant. We agree with the statement of plaintiff that the secret intentions of the parties cannot prevail. The evidence in the instant case discloses the intentions of the parties which were expressed in writing, orally and by other actions.

Plaintiff also states that where the language of the agreement is unambiguous, it is improper to go beyond the expressed language. As we have seen, the agreement between the parties was not confined to the letter of March 31, 1939, as urged by plaintiff. In fact, in his statement of claim plaintiff sues for goods and merchandise sold to the defendant in accordance with the bill of particulars attached thereto, and avers that the items set out in the bill of particulars represent the reasonable price and values thereof. It appears, therefore, that plaintiff was not suing on the basis of a written contract.

The third point discussed by plaintiff is that it is not the province of the court to alter a contract by construction or to make a new contract for the parties. That statement of the law cannot be challenged.

The fourth point urged by plaintiff is that a contract will be construed most strongly against the party preparing it. We do not believe that the proposition is applicable to the instant case because the contract here involved must be ascertained from the letter, the proposals, the conversations of the parties and other actions.

Finally, plaintiff asserts and we agree that the right to have the approval of a third party as the test of the performance of a contract must rest on a provision therein. However, the requirement for the approval of a third party need not be expressed in writing or in any particular action. It may arise from the language used, or from the actions of the parties, or both. It is our view that in the case at bar the court was justified in finding that there was no provision that the spray booth would have to meet the approval of the Ryle corporation. However, the uncontradicted evidence is that

Plaintiff also argues that under the language of the statutes in question, it is improper to go beyond the expressed language. As we have seen, the expressed intent of the writers was not confined to the letter of Issue 22, 1920, as argued by plaintiff. In fact, in the statements of state plaintiff made for goals and assessments held to the determination in conformance with the bill of particulars filedred records, and even that the issue was not in the bill of particulars represent the reasonable order and values thereof. It appears, therefore, this plaintiff was not misled on the basis of a serious contract.

The fifth point discussed by plaintiff is that it is not the province of the court to alter / construct by construction or to make a new contract for the parties. That statement of the law cannot be challenged.

The fourth point raised by plaintiff is that / contract will be construed most strongly against the party preparing it. In the his belief that the plaintiffs is applicable to the instant case because the contract here involved was be constructed from the letter, the measure, the constructions of the parties and other matters.

Finally, plaintiff asserts and he argues that the right to have the approval of a third party to the text of the performance of / contract must rest in a provision therein. However, the evidence the the approval of / third party need not be expressed in writing- it is may principle written. It may arise from the language used, or from the actions of the parties, or both. It is our view that in the case at bar the mere act indicated it finding that Eddie was an immediate that the party would have to make the consent of the 1920 statutes. However, the constitutional evidence is not

the spray booth was constructed in an unworkmanlike manner and did not come up to the specifications. The actions of the parties, including the plaintiff, clearly establish that the spray booth as delivered and installed, was constructed in a poor and unworkmanlike manner and was useless.

Turning to the counter claim filed by defendant, and in view of our conclusions, we find that defendant should have been allowed the $18.00 commission, or profit, which he would have earned on the transaction, plus $10.00 which he had to pay the workmen for dismantling the spray booth, plus $5.25 drayage in removing the spray booth from the premises of the Pyle corporation, or $34.25. He should not be allowed anything for storage of the booth, as the booth was valueless, nor should he be allowed $50.00 for five days' time, which he says he lost, as the $18.00 allowed for loss of profit compensates him for his lost time.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here on the counter claim for defendant and against plaintiff in the sum of $34.25 and costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANT AGAINST PLAINTIFF FOR $34.25 AND COSTS.

DENIS E. SULLIVAN, P.J. AND HENEL, J. CONCUR.

the equity bench was concerned in an unconscionable manner and did not come up to the clean-hands. The actions of the parties, including the defendant, clearly establish that the grant bonds on Edgewood and Institute, was manipulated in a manner and unconscionable manner and are void.

Turning to the counter claim filed by defendant, and in view of our conclusions, we find that defendant should have been allowed the $18,000 commission, or profit, which he would have earned on the transaction, plus $18,000 which he had to pay the workmen for demolishing the navy bench, plus $8,25 charges in removing the navy bench from the premises of the Tyler corporation, or $14,000. He should not be allowed anything for storage of the bench, as the bench was returned, nor should he be allowed $20,000 for lire damage, which he says he lost, as the $18,000 allowed for loss of profit compensates him for his last claim.

For the reasons stated, the judgment of the municipal Court of Chicago is reversed and judgment is entered here on the counter claim for defendant and against plaintiff in the sum of $14,18 and costs.

ENTER AT DEFINITE ORDER ACCORDING TO DECISION HERE.
JUDGE AT DEFINITE ORDER ACCORDING TO DECISION HERE.
$14,18 AND COSTS.

ENTER AT DEFINITE, ETC. ACCORDING TO DECISION.

41064

304 Ill. App.

CHRIST LILLESKAU, Appellee, v. JOHN MARUNIO, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 592

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

On January 17, 1939, plaintiff filed his second amended statement of claim and averred that in December, 1935, defendant, who represented that he was the owner of the premises at 1023 Addison Street, Chicago, agreed with plaintiff to rent said premises to be occupied as a gasoline station and parking lot; that after the agreement was made, plaintiff paid defendant $350; that the parties agreed that such sum was to pay the rent for the premises for the months of December, 1935, and January, February, and March, 1936; that during the months of April, May and June, 1936, plaintiff paid defendant the additional sum of $388.50 as rent for the premises for those months; that defendant failed and refused to give plaintiff possession of the premises during any part of the time mentioned, but permitted another person to be and remain in possession during such time; and plaintiff asked for judgment in the sum of $738.50, plus interest from July 1, 1936. On January 21, 1939, defendant filed an affidavit of merits joining issue. The case was tried before the court without a jury and resulted in a finding and judgment against defendant in the sum of $738.50, to reverse which this appeal is prosecuted.

A perusal of the evidence establishes that on March 14, 1935, defendant and his daughter executed a lease on the premises known as 1019-23 Addison Street, Chicago, to Clear Vision Service Station Inc., for a term commencing April 1, 1935, and ending April 30, 1945, at a rental of $125 per month. Charles Neidenreich was the President

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

On January 17, 1939, plaintiff filed his second amended statement of claim and averred that in December, 1938, defendant, who represented that he was the owner of the premises at 3422 Indiana Street, Chicago, agreed with plaintiff to rent said premises to be occupied as a gasoline station and parking lot; that after the agreement was made, plaintiff paid defendant $300; that the parties agreed that such sum was to pay the rent for the premises for the months of December, 1938, and January, February, and March, 1939; that during the months of April, May and June, 1939, plaintiff paid defendant the additional sum of $225.00 as rent for the premises; that defendant failed and refused to give plaintiff possession of the premises during any part of the time mentioned, but permitted another person to be and remain in possession during such time; and plaintiff asked for judgment in the sum of $725.00, plus interest from July 1, 1939. On January 23, 1939, defendant filed an affidavit of merits joining issue. The case was tried before the court without a jury and resulted in a finding and judgment against defendant in the sum of $725.00, to reverse which this appeal is prosecuted.

A perusal of the evidence establishes that on about 1939, defendant had the complaint amended a third on the premises known as 3418-22 Indiana Street, Chicago, in their Union Service Station for a term commencing April 1, 1938, and ending April 30, 1941, at a rental of $300 per month. Charles Chakeres, who the president

and Albert Burstrom the Secretary of the tenant corporation. The filling station and parking lot were located across from the Cubs Baseball Park. Plaintiff was employed on a salary basis, operating the station for the corporation. Plaintiff also owned six shares of stock in the corporation. On December 2, 1935, defendant served a notice on the corporation that the latter owed $125 as rent for the month of December, 1935, and demanded payment thereof within five days. Defendant introduced evidence which tended to show that in December, 1935, after service of the notice, Heidenreich, the president of the corporation, asked him what amount he would take if the rent for the months of December, 1935, and January, February and March, 1936, was paid in a lump sum, and that he, defendant, agreed to take $350 in cash, and that on the following day which was December 12, 1935, he, defendant was called to the premises and plaintiff handed him the money. Defendant states that Heidenreich informed him that the $350 was money which Heidenreich borrowed from plaintiff on a collateral note. It is clearly established by documents and by convincing testimony that on December 12, 1935, plaintiff loaned $350 to Heidenreich, which was to be repaid 60 days after date, with interest thereon at the rate of 7% per annum. The note also recited that 32 shares of stock in the corporation was pledged as collateral to secure the payment of the loan. The $350 which was paid to defendant in 1935 and which plaintiff claims he paid on the promise to be given possession of the premises, was, in fact, paid by plaintiff in behalf of the tenant corporation in order to secure a reduction of $150 in the rent for the four months. On March 20, 1936, an involuntary petition in bankruptcy was filed in the United States District Court by the plaintiff, Albert Burstrom and a plumber. On an ex parte hearing, a receiver was appointed. He declined to take possession and did not qualify. The corporation filed a reply to the petition. In the meantime, plaintiff, who

and Ghent matters the property of the tenant corporation. The filling station and parking lot were leased entirely from the Duke Realtors Inc. Plaintiff was employed as a salary basis, operating the station for the corporation. Plaintiff also owned six shares of stock in the corporation. On December 6, 1958, defendant served a notice on the corporation that the latter owed $[illegible] as rent for the month of December, 1958, and demanded payment thereof within five days. Plaintiff introduced evidence which tended to show that in December, 1958, after service of the notice, McKenzie, the president of the corporation, asked him what amount he would take if the rent for the months of December, 1958, and January, February and March, 1959, was paid in a lump sum, and that he, defendant, agreed to take $750 in cash, and that on the following day which was December 16, 1958, he, defendant was called to the premises and plaintiff handed him the money. Defendant states that McKenzie informed him that the $750 was money which McKenzie borrowed from plaintiff on a collateral note. It is directly established by documents and by convincing testimony that on December 17, 1958, plaintiff loaned $750 to McKenzie, which was to be repaid 60 days after note, with interest thereon at the rate of 7% per annum. The note also recited that 50 shares of stock in the corporation was pledged as collateral to secure the payment of the loan. The $750 which was paid to defendant in 1958 and which plaintiff claims be paid on the premise to be given possession of the premises, was, in fact, paid by plaintiff in behalf of the tenant corporation in order to secure a reduction of $[illegible] in the rent for the four months. On March 20, 1959, an involuntary petition in bankruptcy was filed in the United States District Court by the plaintiff, Albert Hoffman and a plaintiff. On an ex parte hearing, a receiver was appointed. He proceeded to take possession and did not qualify. The corporation filed a reply to the petition. In the meantime, plaintiff, who

was one of the petitioners, took possession of the premises. On complaint that he was operating the premises without authority, the United States District Court, on June 23, 1936, entered an order finding that plaintiff "has been continuously from April 1, 1936, until the date of this order, without leave of this court, in possession, operating and collecting moneys from operating the business premises and property belonging to the alleged bankrupt located at 1023 Addison Street, Chicago, Illinois." The court directed plaintiff to forthwith turn over the premises and all of the property belonging to the alleged bankrupt, and that he, plaintiff, turn over to the clerk of the court all moneys collected and received by him while operating the business and the premises of the bankrupt, and that he give a full and complete account, under oath, of all receipts, disbursements and credits. He filed an account and therein sought to take credit for rent for the months of May and June, 1936, paid by one George Kade. The court declined to give him credit. It appears that George Kade was operating the premises during April, May and June, 1936, and that he paid the rent during these months. The loan of $350, which plaintiff made to Meidenreich, has not been repaid, nor has the stock given as collateral been redelivered.

It is difficult to understand the basis of plaintiff's claim. He testified that Mr. Marubio, defendant, "came in the office of the corporation and asked me if I wanted to buy some rent from him. I said, Yes, any money in it? He says, I will take $400 for December, January, February and March. I says, Well no, I wouldn't give you that, so I said I will give you $350. Marubio said, All right, I will take $350, so I brought out the money, $350, and handed to Marubio, and he give me a receipt for it." From that

was one of the petitioners, took possession of the premises. On complaint that he was operating the premises without authority, the United States District Court, on June 22, 1956, entered an order finding that plaintiff "has been continuously from April 1, 1956, until the date of this order, without leave of this court, in possession, operating and collecting money from operating the business premises and property belonging to the alleged bankrupt located at 5221 Jackson Street, Chicago, Illinois." The court directed plaintiff to forthwith turn over the premises and all of the property belonging to the alleged bankrupt, and that he, plaintiff, turn over to the clerk of the court all money collected and received by him while operating the business and the rentals of the premises, and that he give a full and complete account, under oath, of all receipts, disbursements and credits. He filed an account and therein sought to take credit for rent for the months of May and June 1956, paid by one George Tade. The court declined to give him credit. It appears that George Tade was operating the premises during April, May and June, 1956, and that he paid the rent during these months. The loan of $250, which plaintiff made to Heidenreich, has not been repaid, nor has the stock given as collateral been redelivered.

It is difficult to understand the basis of plaintiff's claim. He testified that Mr. Marvin, defendant, came in the office of the corporation and asked me if I wanted to buy some rent from him. I said, Yes, any money in it? He says, I will take $250 for Tuesday, January, February and March. I says, well so, I wouldn't give you that, so I said I will give you $250. Marvin said, all right, I will take $250, so I brought out the money, $250, and handed to Marvin, and he gave me a receipt for it." From this

testimony the inference might be drawn that plaintiff proposed to purchase an assignment of the rents. Later testimony, elicited by leading questions, would permit the inference that he was to be given possession of the premises. However, he testified that he also paid rent for April, May and June, 1936. It is difficult to understand why he paid rent for the latter months when he knew that defendant had refused to give him possession during the preceding months for which he claimed to have paid the rent. His testimony and conduct cannot be reconciled. The evidence clearly establishes that the rent which was paid in December was paid in behalf of the then tenant, Clear Vision Service Station, Inc., and that the cash with which the rent was paid was derived by the loan from plaintiff to Heidenreich. As security for the loan, plaintiff was given a block of stock representing the controlling interest in the tenant corporation. What motive actuated plaintiff in taking a leading part in attempting to have the corporation adjudicated a bankrupt, does not appear. Certainly, there is no evidence to sustain the action of the court in entering a finding and judgment against defendant.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment is entered here for defendant and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANT AND AGAINST PLAINTIFF FOR COSTS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

testimony the inference might be drawn that plaintiff proceeded to purchase on behalfment of the trade. Later testimony, elicited by leading questions, would permit the inference that he was to be given commission at the trade's. However, he testifies that he also paid rent for April, May and June, 1966. It is difficult to understand why he paid rent for the latter months when he knew that defendants had refused to give him possession during the preceding months for which he claimed to have paid the rent. His testimony and counsel cannot be reconciled. The evidence clearly establishes that the rent which was paid in December was paid in behalf of the then tenant, Glen Vision Service Station, Inc., and that the cash with which the rent was paid was derived by the loan from plaintiff to defendants. As security for the loan, plaintiff was given a block of stock representing the controlling interest in the tenant corporation. That motive induced plaintiff in taking a leading part in attempting to have the corporation adjudicated a bankrupt, does not appear. Certainly, there is no evidence to sustain the action of the court in vacating a finding and judgment against defendant.

For the reasons stated, the judgment of the municipal court of Chicago in reversed and judgment is entered here for defendant and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANT AND AGAINST PLAINTIFF FOR COSTS.

McGOOEY, P.J., and McCURDY, J., concur.

304 I.A. App

41071

EMMA L. MORRISSEY, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
RAYMOND L. MORRISSEY, Appellant.	)	OF CHICAGO.

304 I.A. 593

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The parties were married on March 16, 1923, and lived together until March 28, 1936. There were no children. On April 4, 1936, defendant sued the plaintiff for a divorce in the Superior Court of Cook County, charging her with various acts of extreme and repeated cruelty. On May 14, 1936, plaintiff (defendant in the divorce suit) moved for the entry of an order for temporary alimony and solicitors' fees. The motion was continued to May 31, 1936. On that day the parties appeared in the Superior Court of Cook County. At the suggestion of the Chancellor, the parties and their solicitors conferred. As a result of the conference, plaintiff (defendant herein) filed an answer and counter claim. The answer denied that she was guilty of extreme and repeated cruelty. The counter claim accused him of extreme and repeated cruelty, and prayed for a divorce. Defendant herein (plaintiff in the divorce case) filed an answer to the counter claim, in which he denied the charges. The case was heard on the uncontested calendar on May 26, 1936. Plaintiff herein testified in the divorce case that the parties had entered into an agreement for the adjustment of their property rights, and that under the agreement defendant herein had made provision to pay for her support and maintenance. She also testified that if the Chancellor saw fit to enter a decree, her only claim against the defendant herein would be under the agreement which the parties signed. On June 1, 1936, the court entered a decree, finding defendant herein guilty of the charges made in the

The parties were married on March 16, 1932, and lived together until March 27, 1932. There were no children. On April 4, 1932, defendant sued the plaintiff for a divorce in the Superior Court of Cook County, charging her with various acts of extreme and repeated cruelty. On May 16, 1932, plaintiff (defendant in the divorce suit) moved for the entry of an order for temporary alimony and solicitors' fees. The motion was continued to May 23, 1932, on that day the parties appeared in the Superior Court of Cook County. At the suggestion of the Chancellor, the parties and their solicitors conferred. As a result of the conference, plaintiff (defendant herein) filed an answer and counter claim. The answer denied that she was guilty of extreme and repeated cruelty. The counter claim charged him of extreme and repeated cruelty, and prayed for a divorce. Defendant herein (plaintiff in the divorce case) filed an answer to the counter claim, in which he denied the charges. The case was heard on the uncontested evidence on May 26, 1932. Plaintiff herein testified in the divorce case that the parties had entered into an agreement for the adjustment of their property rights, and that under the agreement defendant herein had made provision to pay for her support and maintenance. She also testified that if the Chancellor saw fit to grant a decree, her only claim against the defendant herein would be under the agreement which the parties signed. On June 1, 1932, the court entered a decree. Finding defendant herein guilty of the charges made in the

counter claim, dissolving the marriage, and dismissing the original complaint for want of equity. A clause in the agreement required the defendant herein to pay the plaintiff herein the sum of $87.50 per month for her support and maintenance during her natural life, or in the event a decree of divorce be granted to ~~xxx~~ either of the parties, until her death or remarriage, and that in the event he should default in making any of the payments, and such default should continue for a period of ten days, he would pay all necessary expenses, including reasonable attorneys' fees incurred by her in enforcing the terms of the agreement. On April 13, 1938, plaintiff filed her amended statement of claim in the Municipal Court of Chicago and sought judgment for the amount she alleged he was in arrears. Defendant filed an affidavit of merits in which he asserted that the underlying consideration for the written agreement, although not expressly stated therein, was defendant's promise to desist from contesting plaintiff's divorce action and to consent to the entry of a decree, and that, therefore, the agreement was void as against public policy, and unenforceable. On plaintiff's motion the affidavit of merits was stricken and judgment entered against defendant. He appealed, and this court held (Morrissey v. Morrissey, 299 Ill. App. 173,)that the affidavit of merits set up a good defense. Accordingly, the judgment was reversed and the cause remanded with directions that the court overrule plaintiff's motion to strike the affidavit of merits. When the instant case was redocketed, plaintiff filed a reply to the affidavit of merits. The case was tried before the court and judgment was entered against defendant for $925.00 and costs, to reverse which this appeal is prosecuted.

In the previous appeal we decided that defendant alleged a good defense. At the conclusion of the trial, the court decided

municipal civil, disposing the criminal, and considering the original complaint for want of equity. A clause in the agreement required the defendant herein to pay the plaintiff herein the sum of $87.50 per month for her support and maintenance during her natural life, or in the event a decree of divorce be granted to one either of the parties, until her death or remarriage, and that in the event he should default in making any of the payments, and such default should continue for a period of ten days, he would pay all necessary expenses, including reasonable attorney's fees incurred by her in enforcing the terms of the agreement. On April 12, 1928, plaintiff filed her amended statement of claim in the Municipal Court of Chicago and sought judgment for the amount she alleged he was in arrears. Defendant filed an affidavit of merits in which he insisted that the underlying consideration for the written agreement, although not expressly stated therein, was defendant's promise to desist from molesting plaintiff's divorce rights and to consent to the entry of a decree, and that, therefore, the agreement was void as against public policy, and unenforceable. On plaintiff's motion the affidavit of merits was stricken and judgment entered against defendant. He appealed, and this court held (Martinsky v. Martinsky, 329 Ill. App. 178) that the affidavit of merits set up a good defense. Accordingly, the judgment was reversed and the cause remanded with directions that the court overrule plaintiff's motion to strike the affidavit of merits. Upon the instant case was redocketed, plaintiff filed a reply to the affidavit of merits. The case was tried before the court and judgment was entered against defendant for $[illegible] and costs, to reverse which this appeal is prosecuted.

In the instant appeal we decided that defendant alleged a good defense. If the conclusion of the trial, the court decided

that the defense set up in the pleading had not been established. The question in issue is as to whether the written agreement was entered into for the purpose of stimulating a divorce. If so, it is void as being against public policy. We have carefully examined the transcript of the testimony and the exhibits, and are convinced that the trial court was right in concluding that the agreement was not entered into for the purpose of stimulating the divorce. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40910

304 Ill. App.

SOCORRO GASCA,

(Plaintiff) Appellee,

v.

CELESTINE GROSSMAN, EDWIN F. GROSSMAN and HAROLD S. REDEL, as Trustees under the will of Peter A. Grossman, deceased, and BARNEY LIPMAN, doing business as Barney Lipman and Company,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

304 I.A. 593

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment entered in a personal injury action by the court below upon a verdict of the jury finding the defendants guilty and assessing the plaintiff's damages at $1,000. The action was instituted to recover damages for alleged personal injuries when, it is alleged, plaster fell from the ceiling in the bathroom of the apartment occupied by the plaintiff as a tenant. The defendants Celestine Grossman, Edwin F. Grossman and Harold S. Redel had title to the building in question as trustees. The defendant Barney Lipman was their agent.

The plaintiff alleges that the defendants were negligent in that the ceiling of the bathroom was in a decayed and rotten condition; that they knew of the alleged condition, and it was their duty to repair it. The defendants were charged with liability as the owners, operators and managers of the building in question.

The answer to this complaint by Celestine Grossman, Edwin F. Grossmann and Harold S. Redel, alleged that they held title to the premises as trustees and that Lipman was their agent. The answer denied the plaintiff's allegations of due care and of negligence on the part of the defendants. The answer also denied that the defendants were under any duty to the plaintiff and contained an averment that she had assumed the risk of injury.

From the facts as shown by the evidence, it appears that on May 18, 1936, about 5 p.m. while the plaintiff was in the bathroom

The is an appeal by the defendants from a judgment entered in a personal injury action by the Supreme Court upon a verdict of the jury finding the defendants guilty and assessing the plaintiff's damages at $[illegible]. The action was instituted to recover damages for alleged personal injuries sustained by the plaintiff from the falling in the bathroom of the apartment occupied by the plaintiff as a tenant. The defendants Valentine Jensen, Edwin F. Jensen and Harold E. Isabel had title to the building in question as trustees. The defendant Harry Jensen was their agent.

The plaintiff alleges that the defendants were negligent in that the ceiling of the bathroom was in a decayed and rotten condition; that they knew of the alleged condition, and it was their duty to repair it. The defendants were charged with liability as the owners, managers and managers of the building in question.

The answer to this complaint by Valentine Jensen, Edwin F. Jensen and Harold E. Isabel, alleged that they held title as the trustees as trustees and that Jensen was their agent. The answer denied the plaintiff's allegations of due care and of negligence on the part of the defendants. The answer also denied that the defendants were under any duty to the plaintiff and maintained as affirmative that she had assumed the risk of injury.

From the facts as shown by the evidence, it appears that on May 24, 1932, about 2 p.m. while the plaintiff was in the bathroom

of her apartment a piece of plaster fell from the ceiling and struck her on the head. She was given treatment by neighbors and later saw a doctor. In all she was attended by five physicians. Prior to this occurrence she had occupied the apartment in question for about four weeks, moving in on April 23. Before moving into the building she had inspected the apartment and had talked to the agent, the defendant Lipman. She paid one month's rent to Lipman before occupying the premises. Lipman told her the place was in good condition and that it would be cleaned.

After moving in the plaintiff found that the plaster on the bathroom ceiling was loose. She knew this condition existed on May 6 or 8 when the painter who was decorating the place pointed it out to Lipman, who then said it would be fixed. Upon the trial the plaintiff admitted that between May 8 and May 18 she saw the ceiling and its alleged defective condition and knew it was go' fall. Garuba, a tenant occupying the apartment above the plai said the roof of his apartment leaked when it rained and that o occasions water could be heard running between the walls. He c he had complained to Lipman when the rent was collected and the had promised to have the roof repaired. This was denied by Lip in his testimony. Four years prior to the occasion a new roof been put on the building by the then owner. On the day of the occurrence there was a heavy rain.

The first question we believe should be considered is a trustee can be held liable in his capacity as trustee for t The defendants Celestine Grossman, Edwin F. Grossman and Har Redel have been sued herein as trustees under the will of Pe Grossman, deceased, and it is contended by the defendants th trustee may be liable in tort as an individual but he can n liable as a trustee. This is stated in the case of O'Connor Rathje, 238 Ill. App. 489, where the court said:

of the apartment a piece of plaster fell from the ceiling and struck her on the head. She was given treatment by neighbors and later saw a doctor. In all she was attended by five physicians. Prior to this occurrence she had occupied the apartment in question for about three years, paying in on April 27. Before moving into the building she had inspected the apartment and had talked to the agent, the defendant Lipson. The last one didn't want to listen before occupying the premises. Lipson told her the place was in good condition and that it would be cleaned.

After moving in the plaintiff found that the plaster on the bathroom ceiling was loose. She knew this condition existed on July 4 or 5 when the painter who was decorating the place pointed it out to Lipson, who then said it would be fixed. Upon the trial the plaintiff admitted that between July 5 and May 12 she saw the ceiling and its alleged defective condition and knew it was go fall. Before, a friend occupying the apartment above the flat said the roof of his apartment leaked when it rained and that a workman later would be heard running between the walls. In a he had complained to Lipson about the roof and the painter, but insisted it was the roof repairer. This was denied by Lipson in his testimony. Such facts go to the question a man had to be in the building by the then owner. In the day of the apartment there was a heavy rain.

The first question we believe should be considered is whether a tenant can be held liable in his capacity as trustee for the distributive division creditors, which T. occupies and for which here been made claims as trustee under the will of T. or whether he is liable in tort as an individual but as one a trustee as a trustee. This is stated in the case of Gilmore against Lyon, 191 Ill. 100, where the court said:

"So the question is whether Bathje can be held liable as a successor trustee for the damages sustained by the plaintiff.

One of the late expressions of the Supreme Court upon a like question is to be found in the case of Equitable Trust Co. v. Taylor, 330 Ill. 42. The court said:

'A trustee is personally liable for torts committed by him or by his agents or servants in the performance of his duties, but he is not liable in his representative capacity, as the law will not allow trust property to be impaired through the negligence of the trustee or permit him to create any new or additional liabilities against the trust property. The trust estate can make no contract and commit no tort, and if a trustee binds himself for the benefit of the trust estate the contract is his personal contract. Though he describes himself as trustee he is personally liable for its breach, and a personal judgment is the only judgment which can be rendered against him. An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation.'

It is to be noted from this decision of the Supreme Court that the law is that a trustee is only personally liable for breach of contract, and a personal judgment is the only judgment which can be rendered against him. * * *

In the consideration of the case this court has reached the conclusion that defendant Frank G. Bathje is not liable as successor in trust of the estate of the beneficiaries, and for that reason, in applying the rules of law that have been established by the Supreme Court, the judgment as to Frank G. Bathje, successor in trust, must be reversed."

In the discussion of this subject, the plaintiff points to the record in this case and replies to the suggestions offered that the defendants as trustees are not proper parties by making this statement: The law of this state is that an objection based upon either the plaintiff's or defendants' incapacity, whether it be an incapacity to sue, or an incapacity to be sued, must be taken advantage of by the opposite party at his first opportunity. The failure to object at the proper time by motion or by answer, constitutes a waiver of the objection. Franklin v. People, 220 Ill. 384; Cook v. Kershaw, 301 Ill. 503, and the further statement: The defendants having failed to raise the question of their incapacity to be sued at the proper time must be deemed to have waived this point. And then discuss the case that has been cited by the defendants, O'Connor v. Bathje, 298 Ill. App. 489, by stating there is no doubt that it is the law of this state. A careful reading of that case, however, discloses that the objection as to the capacity of the trustee to be sued was raised in the first instance by a motion to strike and the lower court ruled upon such motion erroneously, but that the objection was preserved at the proper

"In the question in dispute liability can by this libelle on a mortgagor further for the damages sustained by the plaintiff.

The act of the lower appellants at the trespass last upon the question is to be found in the case of Lamb v. Tucker, 22 Ill. 49. The court said:

"Courts by previously finding the law, remaining by the law, or by its agents or servants in the performance of his duties, but is not liable for the exportation subsidiary, or the rule, nor do not close their property to be injured through the duplicates of the trustee or party who is to work up or additional liabilities unless the their property. The trust action the rule or contract and sought as law, the C. trustee plain benefit for the benefit of the local action the mortgagee in the personal contract. Though be questions liability. Further as is personally liable for his trespass, and a personal judgment is the only judgment which can be rendered against him. In other words, a trustee in the supervisory capacity is answer to a court of law, for the loss due to violations of the trust relations.

It is to be noted from this decision of the lower court that the law is that a trustee is only personally liable for breach of contract, and a personal judgment is the only judgment which can be rendered against him.

In the consideration of the case this court has reached the conclusion that defendant from a liability is not liable as mortgagor in breach of the marriage of the trustee, and for this reason, in applying the rules of law that have been established by the supreme court, the judgment as to C. Lamb, mortgagor in trust, must be reversed."

In the discussion of this subject, the plaintiff points to the report in this case and relies on the suggestions offered by the defendants as trustees, or by proper course by making this statement: the law of this state is that an objection based upon either the plaintiff's or defendant's insolvency, whether it be an insolvency in fact, or an insolvency to be sued, will be taken advantage of by the opposite party at the first opportunity. The failure to object in the proper time by motion or by demurrer, constitutes a waiver of the objection. Cowdrey v. Lucas, 88 Ill. 269; Lamb v. Lamb, 22 Ill. 49, and the further statement: The defendants having failed to raise the question of their insolvency to be used at the proper time, must be deemed to have waived this point. And this decision the case has been cited by the defendants, Clement v. Cobb, 88 Ill. 268. Now, by stating there is no doubt but it is the law of this state, a correct reading of that case, however, discloses that the principle is the insolvency of the trustee to be used as a bar to the right of a person to attack and the lower court held that the action improperly, but that the objection was waived at the

time by the motion to strike. In the instant case it is stated by the plaintiff that since no objection was raised in the proper manner nor at the proper time, it cannot now be raised by the defendants, and cites in support of her position the case of Kohl v. Schmidt, 367 Ill. 231. Part of the property of the trust was a building, in which an employee was killed when a water tank gave way. Suit was filed against the trustees of the estate. To the declaration the defendants filed (1) the general issue; (2) a plea denying ownership, possession and control of the premises; (3) a plea setting forth an entire lease to a tenant covering the time in question; and (4) a plea that the tenant was operating under the workman's Compensation Act. A judgment of $7000 was sustained by the Appellate Court and the Supreme Court denied certiorari. The owner of the judgment intervened in the accounting suit and the judgment was declared a prior lien which was reversed in the Appellate Court. On appeal by Schmidt as an individual it was urged that since the trustees as such could not be liable it was not a valid judgment. The Supreme Court, after citing several decisions, said:

> "From these decisions it appears that the court may look at the whole record to determine whether or not the judgment against an executor or administrator is a personal judgment against the executor or administrator or a judgment to be satisfied only from the goods of the trust estate. Looking at the record in the case of Kienowski v. Schmidt, it is apparent that the only cause of action stated is a cause of action against the defendant personally. The court of law was without jurisdiction to entertain the action or to render the judgment unless the action was against the defendant personally. It does not appear that there was any demurrer to the declaration. If there was, the defendant afterwards filed pleas and thereby waived the demurrer."

and the plaintiff contends from this citation it appears that assuming the law to be as the defendants contend, the only cause of action stated is against them as individuals, and since they failed to raise the question of capacity at the proper time and in the proper manner, the judgment must be sustained as a personal judgment, and the words "as trustees under the will of Peter A. Crossman, deceased," rejected as surplusage and only descriptio personae.

time by the action in error. In the instant case it is stated by the plaintiff that since he relied on the action in the proper manner and the proper time, it cannot not be related by the defendant, and since he is ignorant of her intention the case of Lal v. Chandra, AIR 1931, Pat 87 for the property of the trust was a building, in which an employee was living and a minor took place was, that his right against the trustee of the minor, in the action, in the maintenance the defendants rights (1) the general issue; (2) a plea denying ownership, possession and control of the property; (3) a plea setting forth an entire lease to a tenant covering the time in question; and (4) a plea that the tenant was employed under the defendant's jurisdiction. A judgment of fact was entered by the trial court and the defendant appealed. The chief of the judgment interest in the [illegible] and the judgment was reversed in the trial court. It appeal by tenant to be indefinite. It was argued that since the trustee is not liable not be liable if was not a will. Judgment, the Supreme Court, after citing numerous decisions, said:

"The case decision is against that the court may in the absence of the right to determine whether or not the judgment against the defendant is a personal judgment against the [illegible] or a judgment or a judgment in the nature of the grant of the [illegible]. Leading in the absence in the case of [illegible] v. [illegible], it is argued that the only means of [illegible] action is a suit of [illegible] the [illegible] property. The [illegible] of his [illegible] judgment to [illegible] the [illegible] or to render the judgment unless the action was against the defendant personally. It does not appear that there was any demurrer to the [illegible]. If that was, the defendant [illegible] and thereby waived the demurrer."

and the plaintiff contends from this statement is clearly that according the law to be as the defendants contend, the only means of action stated is against them in individuals, and since they failed to raise the question of equality in the proper time and in the proper manner, the judgment must be sustained as a personal judgment, and the "judgment under the will of Peter A. Grossman, deceased," rendered in Delaware and not therefore [illegible].

However, the defendants do not agree with the suggestions offered by the plaintiff, by stating that:

"(3) All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first. An answer containing only defenses to the jurisdiction or in abatement shall not constitute an admission of the facts alleged in the plaintiff's complaint." Civil Practice Act, Ch. 110 Sec. 167, Par. 3, Ill. St. Bar Stats. 1937.

On the motion to direct a verdict at the close of the plaintiff's case this question was thoroughly presented to the trial judge, and in support of this position Vol. 4, Sec. 241 Sub-sec. e at Page 479 of Corpus Juris Secundum, was cited, where it is said:

"As a general rule a party is bound in the Appellate Court by the theory pursued below with regard to the relief sought and grounds therefore and he cannot obtain relief not asked in the Court below or urge a ground for relief which was not presented there, especially where the new ground is inconsistent with the theory on which he proceeded at the trial."

and the question is raised as to the application in the case of Kahl v. Schmidt, 307 Ill. 331, as not being in point for the reason that the appeal in that case was taken by the defendant as an individual rather than as a trustee. The defendant trustees in the present case have appealed as trustees, not as individuals, and the Court has no right to consider them before it as individuals. So that it is from this angle that this court is to consider the question of whether the judgment is to be considered as suggested by the plaintiff.

From an examination of the answer of the defendants to the complaint filed by the plaintiff, it does not appear that as a defense it is urged that the defendant trustees would not be held liable in their capacity as trustees for tort, and the defendants rely upon the statement in the answer which denies that the plaintiff is entitled to judgment whatsoever against the defendants, and urge that this question is raised in conformity with the Civil Practice Act, Ch. 110, Sec. 167, Par. 3, which has been quoted in this opinion, and that the question was further raised on the motion to direct a verdict at the close of plaintiff's case and that this matter was presented to

However, the motions do not agree with the respondents affirm by the plaintiff, by saying that:

"(1) (1) motions, whether be the jurisdiction of in whatever or in not, any to plaintiff respondent, but the motion may order defense to the jurisdiction or in motions so to trial time, in answer contending only defense to the jurisdiction or in abatement shall not constitute an submission of the case filing in the plaintiff's complaint." Civil Procedure Act, ch. 110 Sec. 327, par. 2, 110, ch. Per Curia, 1907.

In the motion to direct a verdict in the close of the claimant's case this question was thoroughly presented to the trial judge, and in support of this position Vol. 4, Sec. 341 Ann. of Corp. Jur. Civil Procedure, we read, there it is said:

"In a general sense a party is bound in the jurisdiction court by the theory pursued below with regard to the relief sought and proceeds therefore and be asked obtain relief not raised in the court below or upon a ground for relief which was not presented there. Especially where for new ground in inconsistent with the theory on which he proceeded at the trial."

and the question is raised as to the application in the case of Cobb v. Schmidt, 207 Ill. 314, as not being in point for the reason that the appeal in that case was taken by the defendant as an individual rather than as a trustee. The defendant trustees in the present case have appealed as trustees, not as individuals, and the court has no right to consider them before it as individuals. In that it is from this angle that this court is to consider the question of whether the judgment is to be considered as suggested by the plaintiff.

The no consideration of the merits of the difficulties in the complaint filed by the plaintiff, is here not clear that as a matter it is argued that the defendant trustees would not be held liable in their capacity as trustees for fees, and the defendants rely upon the authority in the cases which assign that the plaintiff is entitled to judgment whatever against the defendants, and even that this question is raised in connexity with the civil practice Act, ch. 110, Sec. 327, par. 2, where the term judge in this opinion, and that the question was further raised on the motion to direct a verdict at the close of plaintiff's case and that this motion was presented to

the court, who overruled the objections urged by the defendants.

It is clear that whatever defense is to be presented in an action by the plaintiff, it is necessary to set forth fully the nature of the defense that is to be relied upon, and when we come to examine paragraph 3, as we have stated, "All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order defenses to the jurisdiction or in abatement to be tried first." This question was not raised in the manner required by this provision of the Civil Practice Act, and not having presented this defense in their answer, the defendants have waived this defense.

This court passed upon a like question in the case of Samuel G. Currey v. Emmett H. Blackwell, Sr., and Annie Blackwell, his wife, et al., 295 Ill. App. 613 (Abst.). In that case it was urged that an alteration was made in the trust deed after it was executed by James H. Blackwell, rendering the instrument void. The alteration charged appears on the first page of the instrument and refers to the principal note for $3,000. This court said:

> "Moreover, the defense of alteration is not set forth in any of the pleadings, and was made for the first time before the master. Under the plain provisions of the Civil Practice Act, affirmative defenses, such as fraud, illegality, or that the instrument or transaction is either void or voidable in point of law, which would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. (Par. 164, Sec. 40, subsec. (3); par. 167, sec. 43, subsec. (4); Ch. 110, Ill. Rev. Stat. 1937), * * * and never questioned its validity until the matter was heard before the master."

which applies equally to the instant case.

This question was raised for the first time on the defendant's motion to direct a verdict at the close of the plaintiff's case, and according to this provision of the Civil Practice Act, the question was not properly raised at a time so as to give the plaintiff notice of such defense, and therefore it was waived and the court was fully justified in refusing to entertain the motion made by the defendants, as we have stated.

the court, now overruled the objections urged by the defendants.

It is clear that whatever defense is to be presented in an action by the plaintiff, it is necessary to set forth fully the nature of the defense that is to be relied upon, and when we come to consider paragraph 3, as we have stated, "All defenses, whether to the jurisdiction or in abatement or in bar, may be pleaded together, but the court may order between the jurisdiction or in abatement to be tried first." This question was not raised in the manner required by this provision of the civil practice act, and not having presented this defense in their answer, the defendants have waived this objection.

This court passed upon a like question in the case of Cheney v. Lewis & Co. Electric Co., 19 Ill. App. 614 (1886). In that case it was argued that an electrician was sent in the first deed after it was executed by James E. Blackwell, receiving the instruments valid. The electrician charged expenses on the first page of the instruments and return to the principal more for d.,000. This court said:

"However, the defense of identification is not set forth in any of the pleadings, and we work for the first time when before the court. Under the plain provisions of the civil practice act, affirmative defenses, such as fraud, illegality, or that the instrument or transaction is either void or voidable in point of law, which would be liable to take the opposite party by surprise, must be plainly set forth in the answer or replies. Ill. Rev. Stat. (1885), ch. 110, sec. 31; Ill. Rev. Stat. (1885), ch. 110, sec. 40; Ill. Rev. Stat. (1885), ch. 110, sec. 41; and never determined the validity until the matter was heard before the master."

which applies equally to the instant case.

This question was raised for the first time on the defendant's motion to direct a verdict at the close of the plaintiff's case, and according to this provision of the civil practice act, the question was not properly raised as a bar so as to give the plaintiff notice of such defense, and therefore it was waived and the court was fully justified in refusing to entertain the motion made by the defendants, as we have stated.

One of the questions called to the attention of the court by the defendants is that the judgment is erroneous for the reason that it is based upon proof of negligence different from that alleged in the complaint. The negligence charged in the complaint consists of failure to maintain the ceiling of plaintiff's bathroom in a proper state of repair, and defendants suggest that the plaintiff's evidence, if true, shows that a leaky roof was the proximate cause of the accident, and cite the case of Brodsky v. Frank, 343 Ill. 110; Clark v. Bond County Gas Co. 287 Ill. App. 437. The rule as suggested may be a proper one but the question in this case is whether it applies to the facts that were offered in evidence in support of plaintiff's case.

The plaintiff charges that on the 18th day of May, 1938, the defendants were owners, operators and managers of the premises at 1357 West Roosevelt Road and that the plaintiff was a tenant in the premises; that the ceiling of the bathroom of the apartment occupied by the plaintiff was in a decayed and rotten condition and badly in need of repairs; that on said date, while the plaintiff was in the exercise of all due care and caution for her own safety, a piece of plaster about 36 inches long and 18 inches wide fell from the ceiling of said room and struck the plaintiff on the head; that the defendants knew of this condition, and thereupon it became their duty to repair the premises so as to put them in a safe condition; that as a result of this plaster falling on the plaintiff's head, the plaintiff was injured internally and externally, sustaining permanent and lasting injuries to her nervous and circulatory system, and that by reason thereof plaintiff has been hindered and delayed in her business and occupation and has been compelled to expend large sums of money endeavoring to be cured, and she asks judgment in the sum of $10,000. The theory upon which the defendants object is that there is evidence

the issue upon which the defendants rely is that there is evidence sufficient to go to the jury, and the trial judgment in the sum of $15,000.00 nonetheless is in error, and the case judgment and has been remanded to correct large sums of money physical injurity has been disclosed and relied in her business and injuries to her arteries and circulatory system, and that by reason injured intensity and experiencing mental anguish and loosing of this disaster rolling on the plaintiff's head, the plaintiff and the complaint so is to not them in a car constituent that on a usually time of this accident, and attention is because which such as normal of life this and which the plaintiff on the peril that the defendants plaintiff about 20 inches long and 12 inches wide fell from the ceiling ceiling of six non wire net fixtures for her own safety, a piece of material and not good date, while the plaintiff was in the parlors; but the ceiling of the building of the restaurant complaint by the plaintiff was in a tenuous and worse condition and easily in fact not immediately that and that the plaintiff was a person in the parlors and the defendants were careful inspecting the condition of the premises at the time of the accident, and the same judgment in the sum of $15,000.00 is excessive and not sustained by the evidence in the record, and the trial court erred in overruling the motion for a new trial.

The plaintiff complain that on the 12th day of July, 1956, the defendants were careful inspecting the condition of the premises at the time of the accident, and that the plaintiff was a person in the parlors; but the ceiling of the building of the restaurant complaint by the plaintiff was in a tenuous and worse condition and easily in fact not immediately that and that the plaintiff was a person in the parlors and the defendants were careful inspecting the condition of the premises at the time of the accident, and the same judgment in the sum of $15,000.00 is excessive and not sustained by the evidence in the record, and the trial court erred in overruling the motion for a new trial.

The plaintiff contends that on the 12th day of July, 1956, the defendants were careful inspecting the condition of the premises at the time of the accident, and that the plaintiff was a person in the parlors; but the ceiling of the building of the restaurant complaint by the plaintiff was in a tenuous and worse condition and easily in fact not immediately that and that the plaintiff was a person in the parlors and the defendants were careful inspecting the condition of the premises at the time of the accident, and the same judgment in the sum of $15,000.00 is excessive and not sustained by the evidence in the record, and the trial court erred in overruling the motion for a new trial.

that a leaky roof caused this plaster to fall, but when we come to examine the allegations of fact, we find that the plaintiff has charged that the ceiling of the bathroom which was occupied by her was in a decayed and rotten condition and badly in need of repairs, and the fact that there was evidence of a leaky roof, together with the fact that water leaked so as to pass through the building, only tends to show the condition at the time the plaster fell. We are unable to agree with the theory that the judgment is based upon proof of negligence different from that alleged in the statement of claim. The defendants were charged with the fact that the plaster was in a decayed and rotten condition and badly in need of repair, and as a result the plaster fell. The fact that water leaked from the roof, only tends to show conditions as they existed at the time of the accident, and we are unable to agree with the theory of the defendants upon this question.

The question that seems to be of importance in the minds of the defendants is that the plaintiff was guilty of contributory negligence, and they point out that the condition of the plaster in the ceiling was known to the plaintiff, and quote her as testifying:

> "After I moved into the apartment I discovered that the ceiling was loose in the bathroom. * * * When the men were talking about the ceiling in the bathroom I understood that that thing was going to fall down. * * * That condition remained there all the time until this accident. Every time I went to the bathroom between the 8th of May and the 18th of May I saw the plaster. It was loose. I have to get in the bathroom twice or three or four times a day. * * * When I talked with the man on the 6th or 8th of May I was afraid the ceiling was going to fall down because the man said the thing was going to fall and I was thinking about it all the time."

We ought to take into consideration that the agent of the defendants - Lipman, a defendant - promised to make repairs, and further, that the testimony of the plaintiff does show that she testified, "I don't worry very much about it because I was satisfied, I was understood to fix it, and I never thought the thing would fall."

that a lady must remove this pleator to fit, but when we come to examine the circumstances of case, we find that the plaintiff has charged that the ceiling of the bathroom which was occasioned by her was in a damaged and rotten condition and owing to neglect of defendant, and he fair that there was evidence of a lady-tenant, together with the fact that water leaked so as to come through the ceiling, only tends to show the condition of the floor the latter fell. We are unable to agree with the counsel that the judgment in favor of negligence different from that alleged in the statement of claim. The defendants were charged with the fact that the cleaner was in a damaged and rotten condition and badly in need of repair, and as a result the cleaner fell. The fact that water leaked from the roof, only tends to show condition as they related to the size of the cleaner, and we are unable to agree with the theory of the defendants upon this question.

The question then comes to be of importance is the wisdom of the defendants in that the plaintiff was guilty of contributory negligence, and they made out that the condition of the floor in the ceiling was known to the plaintiff, and under her by testimony:

"Later I moved into the apartment I discovered that the ceiling was lower in the bathroom. * * * That the lady were talking about the ceiling in the bathroom I understood she was going to move in that room. * * * That conversation concerned there all the time until this occurred. Every time I went in the bathroom between the 5th of May and the time of my I saw the cleaner. If you leave, I mean to put in the bathroom tenant or floor cleaner a day. * * * When I talked with the man on the 4th or 5th of May I was afraid the ceiling was going to fall down because the man said the floor was going to fall and I was thinking about it all the time."

We might go into considerable the opera of the testimony - liquor, "defendant - complained to make repairs, and further, that the testimony of the plaintiff does show she was hurtled, "I don't merely very a-do about it because I was polished, I was nervous to fix it, and I never thought the ceiling would fall."

The question of contributory negligence is one of fact for the jury, and it seems from the facts that the defendants lulled the plaintiff into a sense of security in their promise to repair the ceiling, and it was for the jury to believe whether the evidence such as we have stated was sufficient to charge her with contributory negligence. The plaintiff cites the case of Frank v. Simon, 35 N. Y. S. 600, and from her suggestion of the facts it appears that the plaintiff was a tenant in an apartment; that the roof leaked and the landlord was notified of that fact. The testimony also shows that the plaintiff notified that the ceiling was bent and she thought that it would fall. The landlady promised to repair the condition, and the court upon the questions involved said:

> "The jury would have been warranted in finding that the only defect in the ceiling was caused by the water which came through the roof; that the ceiling would not have fallen, but for the neglect of the landlord to repair the roof; that the roof was in such a bad state of repair that water came through on the occasion of every rainstorm; that the defendant had actual, as well as constructive, notice of these facts, and had notice of the dangerous condition of the ceiling caused by the roof a sufficient time before the accident to have enabled her, in the exercise of reasonable care, to repair the roof. Negligence on the part of the defendant could fairly be inferred from this evidence."

The court also said:

> "We are also of the opinion that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in remaining in the apartment or failing to have the plaster removed or repaired. Even though some of the plaster, at times when the water was leaking through it, may have appeared to be hanging or sagging, this did not necessarily indicate that it would fall if the cause were removed by making the necessary repairs to the roof to prevent its leaking in the future, which the landlord appears always to have promised to do. In determining whether plaintiff was guilty of contributory negligence in continuing to occupy the apartment of the defendant, her conduct must be weighed in the light of the surrounding circumstances, including the fact that she had paid for the use of the apartment and might be unable to obtain or pay for the use of another. The jury might well find on this evidence that it was not an improvident act for the plaintiff to remain in the apartment."

The question of contributory negligence is one of fact for the jury, and is never from the facts that the defendants failed the plaintiff like a sense of security in their premise to repair the ceiling, and it was for the jury to weigh whether the evidence such as we have stated was sufficient to charge her with contributory negligence. The plaintiff cites the case of Kunz v. Gilmore, 88 S. E. 6, 6, and from her recapitulation of the facts it appears that the plaintiff was a tenant in an apartment; that the roof leaked and the landlord was notified of that fact. The testimony also shows that the plaintiff noticed that the ceiling was damp and she thought that it would fall. The landlord promised to repair the condition, and the court upon the questions involved said:

"The jury would have been warranted in finding that the only duties in the premises was assumed by the owner which came through the fact that the ceiling would not have fallen, but for the negligence of the landlord to repair the roof; that the tenant was in good a fact state of repair that water came through on the occasion of every rainstorm; that the defendant had notice, or will be constructive, notice of these facts, and had duties of the dangerous condition of the ceiling caused by the roof a sufficient time before the accident to have remedied the defect, in the exercise of reasonable care, to render the roof. Negligence on the part of the defendant would fairly be inferred from these evidence."

The court also said:

"We are also of the opinion that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in remaining in the apartment or failing to have the ceiling repaired or replaced. Even though some of the plaster, it was not full, if the rooms were rendered by making the necessary repairs to the roof be prevent the leaking in the future, which the landlord promised should be done immediately on the plaintiff's complaint, this did not necessarily indicate that the plaintiff in the room was guilty of contributory negligence in waiting for the landlord to do the work. The question of contributory negligence is upon the plaintiff was guilty of contributory negligence in remaining in the apartment, or failing to have the ceiling repaired or replaced, must be weighed in the light of the surrounding circumstances, including the fact that she had the promise of the landlord that he would make the repairs. The question of contributory negligence is ordinarily a question of fact for the jury, and it was not error for the court to submit the question to the jury in this case."

The plaintiff calls our attention to the fact that the doctrine of Frank v. Simon, 35 N. Y. S. 666, has been followed in Fagan v. Harrin, 165 N.Y.S. 417; Eckert v. Reichardt, 243 N.Y. 72, 152 N. E. 469, and in Finegan v. Schiechter, 153 N.Y.S. 67.

Our attention is called also to the case of Christiansen v. Hayiants, 185 Ill. App. 318. So when we come to consider all the facts in the case, the question of contributory negligence is one for a jury.

The defendants further question the propriety of the court in giving instructions 5, 7, 11 and 12, for the reason that the jury was instructed upon acts of negligence not charged in the complaint.

Instructions 5, 7, 11 and 12, are as follows:

"5. Gentlemen of the Jury, you are instructed, as a matter of law, that the roof of a tenement house or building, the spaces between the walls and between the floors and ceilings of the lower and upper apartments, respectively, are parts of the building over which the landlord exercises control, and he is chargeable with maintaining the same in good repair and reasonably safe condition and should he fail to do so to the injury of any of the tenant or tenants, such tenant or tenants, providing they are in the exercise of ordinary care for their own safety, may maintain an action against the owner for any resulting injuries, provided that the landlord had knowledge of the said defects or by the exercise of ordinary care should have had such knowledge."

"7. You are instructed, as a matter of law, that the owner of the building has a duty to keep the premises which are for the common use and benefit of all the tenants, in a proper state of repair so that anyone of the tenants or any other person rightfully upon the premises would suffer injury because of the condition of the said premises, and if you find from a preponderance of the evidence in this case that the defendants failed to keep the roof in a proper state of repair, and that because of their failure so to do the plaster fell from the ceiling, injuring the plaintiff, you should find the defendants guilty."

"11. If you find, from a preponderance of the evidence, in this case, that the defendants knew that the premises in question were in a bad state of repair, and if you further find from a preponderance of the evidence that the said bad state of repair was the direct and proximate cause of the injuries sustained by the plaintiff in this case, and if you further find from a preponderance of the evidence that the plaintiff was in the exercise of all due care and caution for her own safety, then and in such case you should find the defendants guilty."

"12. Gentlemen of the Jury, if you believe from a preponderance of the evidence that the plaintiff, Socorro Osana, was struck by

The plaintiff made our statement by the fact that the decision of Jones v. Lewis, (N. S. 7, 5, 456), was been followed in Lewis v. Jones, 188 A.R.1. 4171 Jones v. Lewis, 20 A.R. 77, 20 S. C. 456, and in Jones v. Johnson, 18 O.A.R. 67.

An attempt to point also to the case of Christiansen v. Hatfield, (20 Ill. App. 218). It does no good to insist at the most, the question of contributory negligence is the jury's.

The Ontario Court quoting the judgment of the Court in giving instructions 5, 7, 11 and 12, for the reason that the jury was instructed upon the of negligence and contrary in the evidence.

Instructions 5, 7, 11 and 12, are as follows:

"5. Instructions of the Judge, you are instructed, as a matter of law, that the fact of a tenement house or building, the owner having the duty of keeping the floors and stairs of the house and upon elevators, respectively, are parts of the building over which the landlord exercises control, and is in charge with maintaining the same in good repair and reasonably safe condition and should be held to be at the injury of any of the tenants or strangers, such tenants or strangers, providing they are in the exercise of ordinary care for their own safety, may maintain an action against the owner for any resulting injuries, provided that the landlord had knowledge of the said defects or by the exercise of ordinary care should have had such knowledge."

"7. You are instructed, as a matter of law, that the owner of the building has a duty to keep the premises which are for the tenants in a proper state of repair, in a proper manner of the exercise of ordinary care, and that because of their failure to do so the landlord fell from the ceiling, injuring the plaintiff, you should find the defendants guilty."

"11. If you find, from a preponderance of the evidence, in this case, that the defendants knew that the ceiling in question was in a bad state of repair, and if you further find from a preponderance of the evidence that the jail had been in a state of repair the landlord and negligence cause of the injuries sustained by the plaintiff in this case, and if you further find from a preponderance of the evidence that the plaintiff was in the exercise of ordinary care for her own safety, then and in such case you should find the defendants guilty."

"12. Instructions of the Judge, if you believe from a preponderance of the evidence that the plaintiff, Amarene Jones, was struck by

a portion of the plaster falling from the ceiling of the bathroom in question, and that at the said time and immediately prior thereto she was in the exercise of due care for her own safety, and if you further believe from the evidence that the said portion of plaster ceiling was defective and fell because of rain-water leaking through the roof because of the said roof being in a leaky and unsafe condition and in bad repair, and if you further believe from the evidence that the owner of the said building knew of such conditions before the time of the said occurrence, or by the exercise of ordinary care could have known of the same and did nothing to repair the said roof, and if you further find from the evidence that the said condition of the said roof was the proximate cause of the said injury, and that the plaintiff was injured by being struck by the said section of ceiling plaster as hereinabove set forth, then your verdict should be for the plaintiff."

In discussing these instructions, as to whether the evidence of certain acts was properly admitted by the court, we have passed upon this question in this opinion as being admissible under the pleadings of the plaintiff.

Regarding the questions that are raised by the defendants as to acts which they charge were not alleged by the plaintiff in her statement of claim, one of the authorities submitted by these defendants is Zobeidt v. Balling, 81 Ill. App. 308, where the court said:

> "An instruction that presents to the jury a different case from that declared on is erroneous."

which does not apply to the quoted instructions.

The defendants call our attention to the instruction in respect to the reasonableness of time within which a landlord is generally allowed to make repairs. While it is true that the rule as to reasonable time is one of importance, yet from the facts as we have them in this record the defendant Lipman had knowledge of the condition of the bathroom at the time the plaintiff visited the apartment in the premises, and the condition of the ceiling of this bathroom was discussed, and Lipman, according to the evidence, promised to "fix" it - the word used by the plaintiff in her testimony. In considering

a portion of the charge flowing from the writing of the petition in question, not that it is the only one and inevitably what thereby the man in the street for his own safety, and if you further believe from the evidence that the will written of charge making the defendant and that because of intoxication taking through the fact because of the mere fact being in a hazy and unfit condition and in not sound, and if you further believe from the evidence that the cause of the said building also of such sanitation before the time of the said testamentary or by the testator of capacity that shall have been of the same and all wanting to provide the said case, and if you further find from the evidence that the said condition of the said fact was the proximate cause of the said injury, and that the plaintiff was injured by being placed by the said medical of selling physicians as testimony and facts, then your verdict should be for the plaintiff.'

In discussing these instructions, as to whether the evidence of certain acts was properly admitted by the court, we have passed upon this question in this opinion as being admissible under the pleadings of the plaintiff.

Regarding the questions that are raised by the defendants as to acts which they charge were not alleged by the plaintiff in her statement of claim, one of the instructions submitted by them is therefore in Conrad v. Collins, 82 Iil. App. 304, where the court said:

"An instruction that presents to the jury a different case from that declared on in evidence,"

which does not apply to the proper instructions.

The defendants call our attention to the instruction in regard to the reasonableness of time within which a testator is generally allowed to make revoke. While it is true that the rule as to reasonable time is one of objective, yet from the facts in this in this record the defendant issues had knowledge of the condition of the testatrix at the time the plaintiff visited the sanitarium in the premises, and the condition of the plaintiff before and during the sanitarium, and the condition of the testatrix, and the evidence, admitting to the evidence, admitted to "the" is — the good cause by the plaintiff in her testimony. In considering

this question we were of the opinion that the promise made by Lipman to repair this ceiling lulled her into a sense of security, and we also held that the fact that water leaked through the roof and came down from the ceiling into this bathroom was proper evidence to be considered by the jury on the question of negligence of the owners of the premises. The promise to fix the ceiling and the knowledge which the defendants had of the condition there, were not violated by anything that was said in the instructions as given to the jury, but one instruction was given on behalf of the defendants and read to the jury as follows:

> "8. You are instructed that before a landlord may be held liable for damages to a tenant because of injuries sustained by a defective condition of the premises it must appear from a preponderance of the evidence that such defective condition was unknown to the tenant and known to the landlord or in the exercise of ordinary care should have been known to him."

While this instruction is not a clear statement of the law applicable where the facts are such as we have indicated in this opinion, on this question the defendants offered and there was given Instruction 9, which is as follows:

> "9. If you believe from the evidence in this case that the ceiling in the bathroom of the plaintiff's apartment was defective and dangerous, and if you further believe from the evidence that such defective and dangerous condition of the ceiling was open and obvious and was not concealed, and if you further believe from the evidence that the plaintiff prior to the 18th day of May, 1933, had knowledge of the alleged dangerous and defective condition of the ceiling, then you are instructed that there can be no recovery in this case and your verdict must be not guilty."

This instruction upon the statement as contained in it is such that the fact that the plaintiff had knowledge would bar her from a recovery. We do not believe the law is such as contended for by these defendants. The instruction must be given applying the law to the facts as they appear in evidence, and upon the law and the facts the jury are to be directed as to their duty in the premises. This

instruction is unfair to the plaintiff in that under all the circumstances if she had knowledge of the condition of the premises, as we have stated before, she could be barred from recovery for any injuries she had sustained in the premises. These instructions we have quoted as given by the defendants are such that the defendants are not in a position to complain, and no complaint is to be made of the instructions given on behalf of the plaintiff. The defendants had notice of the condition; also promised to repair, and accepted the money for the rent from the plaintiff under the circumstances, and it seems but just that the jury should have been properly instructed on behalf of the defendants before the defendants would be in a position to complain of the instructions of this plaintiff. Other questions are raised, but we have read and considered the instructions and are of the opinion, from the state of the record, that there was no such error as would justify a reversal as urged by the defendants, so far as these instructions are concerned.

The defendants contend that a rental agent is not charged with the duty of making repairs, and urge that in the present case there is no evidence whatever with reference to the contract between Barney Lipman, one of the defendants, and his principals, and further contend that there is no evidence that a duty existed as between him and his principals to fix the roof, repair the ceiling or maintain the building in any respect or that he had any authority to do any of these things. In fact the only evidence concerning the roof showed that it had been constructed four years before by the then owner. The only actions of the defendant Lipman, positively testified to by the plaintiff or her witnesses was that he rented the apartments and collected the rents. There is not any evidence that he had authority to order even decorating done. Under these circumstances, the defendants urge, plaintiff has not established negligence on the part of the defendant Barney

Impossible to refer to the plaintiff in this matter all the circumstances if our knowledge of the qualities of the premises, as we have stated before, are really so scanty from recovery for any injuries she had sustained in the premises. These instructions we have quoted as given by the defendants are such that the defendants are not in a position to complain, and no complaint is to be made of the instructions given on behalf of the plaintiff. The defendants had notice of the condition; also promised to repair, and consequently may be sued from the plaintiff under the circumstances, and it seems not just that the jury should not have recovered.

Instructions in behalf of the defendants before the defendants would be in a position to complain of the instructions of the plaintiff. Other matters are raised, but we have read and considered the instructions and are of the opinion, from the state of the record, that there was no such error in their giving a proper so urged by the defendants, as that the instructions are sustained.

The defendants contend that a verdict ought to be set aside for want of evidence, and say that in the present case there is no evidence adduced sufficiently to the contract between Kinney Lumber, the of the defendants, and the plaintiff, and further contend that there is no evidence that a duty existed as between the and the plaintiff to fix the roof, prior the making or maintain the building in the property if they be not any negligence in do any of these things. In fact the only evidence concerning the roof shows that it had been constructed four years before by the same owner. The only witness of the defendant Lumber Company testifies to by the plaintiff or her witnesses was that he owned the apartments and maintained the roof. There is not any evidence that be not negligent to order even necessitating them. Under these circumstances, the defendants who, plaintiff has not established negligence on the part of the defendant Kinney

Lipman. Nevertheless, when we come to consider the question, we find that Harvey Lipman acted as an agent, and therefore was under a duty to his principals. Notwithstanding that he was under such duty, he still had a duty to third persons. That duty was binding on him and he could not disregard their rights with impunity. Having disregarded their rights he is liable.

This court in the case of Rising v. Ferris, et al., 216 Ill. App. [illegible], considered the question of liability of a principal and agent in an action for personal injuries to a child that happened to be in a theatre which the principal, Clark Amusement Company owned, and John H. Ferris acted as agent for this Amusement Company, and after considering the facts as well as the law, reached the conclusion that there was no error in the judgment against both the Amusement Company and the agent. After discussing the various authorities that were cited on the question involved, we said:

> "Under the law, by the weight of modern authority, and under the peculiar facts of the present case, we are of the opinion that the defendant, Ferris, is liable for the injuries sustained by plaintiff. The evidence disclosed that he had general control of the theater and of its operation, that he made the leases or contracts for the use of the theater auditorium, that the unguarded switchboard was a dangerous mechanism to uninformed persons lawfully on the stage and in its immediate vicinity, and that he knew that the switchboard was in the position that it was. Then, under the prior arrangements made, he allowed many children and others on the stage, on the afternoon in question, for the purpose of having a rehearsal for a play to be subsequently given, and on that stage there was a mechanism, dangerous because unguarded, he 'voluntarily set in motion an agency, which, in the ordinary and natural course of events would expose persons,' unaware of the danger and lawfully on the stage, to personal injury. By the use of ordinary foresight in placing a guard around the switchboard he could have avoided the accident. We think he was guilty of negligence which proximately caused the injuries to plaintiff.
>
> And, under the weight of authority, he is jointly liable, with the Clark Amusement Company, his principal. (2 Mechem on Agency, 2nd ed. sec. 2011; Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 253; Greenberg v. Whitcomb Lumber Co., 20 Ala. [illegible]; Southern Ry. Co. v. Priesle, 134 Ga. 736, 738.)
>
> It is also contended that the proximate cause of the injury was plaintiff's wearing a dress trimmed with tinsel and not the failure to erect a guardrail around the switchboard. We do not

think that the evidence supports this contention. Furthermore, the wearing of tinsel by children in plays in which they take part is common, and not ordinarily dangerous. The dangerous agency in this case was the unguarded switchboard."

In the instant case we find that the agent knew of the condition of the ceiling in the premises which was rented by the plaintiff, accepted the rent offered and promised to repair the ceiling of the bathroom, and as we have stated, by his conduct he induced the plaintiff to rent these premises, and having accepted the money for and on behalf of the defendants, who were in control, the court properly overruled the motion for a new trial, and the judgment that was entered on the verdict of the jury is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

40959

304 I.A. Am.

MILDRED PLUNKETT,

Plaintiff - Appellee,

v.

HALDANE M. PLUNKETT,

Defendant- Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

304 I.A. 594

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree entered in the Superior Court of Cook County, on May 29, 1938, dissolving the marriage of the plaintiff and the defendant, and ordering that the defendant make the following payments: $10 per week to the plaintiff as permanent alimony; $250 to the plaintiff for attorney's fees; $130 to Dr. George M. Hoffenmeyer for medical services rendered to the plaintiff; $124 to Dr. D. M. Benek for dental services rendered to the plaintiff; $255 to the plaintiff for arrears in temporary alimony; and $30.00 to the plaintiff for court reporter's fees. The court further ordered that the defendant file forthwith a ne exeat bond in the sum of $1,500, with good and sufficient surety to indemnify the plaintiff for all past due alimony, court costs, attorney's fees, the medical and dental bills, and any and all future alimony under and by virtue of the decree.

The appeal of the defendant questions the sufficiency of the amended complaint to justify the entering of the decree for divorce, or the granting of any relief whatever, and the action of the trial court in enforcing the decree after the appeal to this court was perfected.

The original complaint for separate maintenance was filed on April 1, 1938, two days after the plaintiff left the defendant, and it was still pending when the amended complaint for divorce was filed on May 24, 1939.

The amended complaint for divorce alleged the residence of the plaintiff and the marriage of the parties. It also alleged

[illegible]

[illegible]

[illegible]

that the plaintiff conducted herself as a good, dutiful and affectionate wife, and that she was compelled to leave the defendant on March 30, 1938, because of his continuous cruel and inhuman treatment, forcing her to live separate and apart from the defendant because of her own actions, which were endangering her life, and that she was still living separate and apart from the defendant.

The amended complaint also alleged that the plaintiff did not give the defendant any cause or provocation for his actions, but that the defendant, wholly disregarding his marriage vows and obligations to her as his wife, caused her, through his fault, to live separate and apart from him as his wife since March 30, 1938, and that the defendant, through his actions, is guilty of wilfully deserting and absenting himself from the plaintiff for the space of more than one year from the date thereof.

The amended complaint prayed for a decree for divorce and the payment of alimony and attorney's fees.

The defendant filed his answer to the amended complaint on May 23, 1939, admitting that the plaintiff separated from him on March 30, 1938, but denying that she did so because of any cruel or inhuman treatment or improper conduct on his part, or that he had said or done anything which justified her desertion, or which was cruel, inhuman or improper. The answer also denied that he deserted the plaintiff and averred that the plaintiff had absented herself from the defendant continuously from March 30, 1938, to the date of the answer.

The defendant filed a counter-claim for divorce on May 20, 1938, averring that the plaintiff deserted the defendant on March 30, 1938, and charging her with adultery on December 2, 1937, and on other subsequent dates.

The plaintiff answered the counter-claim and denied the charges of desertion and adultery.

The question which is called to the attention of this court

that the plaintiff conducted herself as a good, faithful and affectionate wife, and that she was compelled to leave the defendant on March 30, 1938, because of his continuous cruel and inhuman treatment, thereby had to live separate and apart from the defendant because of his own actions, which were endangering her life, and that she was still living separate and apart from the defendant.

The amended complaint also alleged that the plaintiff did not give the defendant any cause or provocation for his actions, but that the defendant, wholly disregarding his marriage vows and obligations to her as his wife, caused her, through his fault, to live separate and apart from him as his wife since March 30, 1938, and that the defendant, through his actions, is guilty of willfully deserting and absenting himself from the plaintiff for the space of more than one year from the date thereof.

The amended complaint prayed for a decree for divorce and the payment of alimony and attorney's fees.

The defendant filed his answer to the amended complaint on May 24, 1939, admitting that the plaintiff separated from him on March 30, 1938, but denying that she did on account of any cruel or inhuman treatment or improper conduct on his part, or that he had at any time striking such jealousy her deceitful, or words too cruel, inhuman or improper. The answer also denied that he separated the plaintiff and averred that the plaintiff had absented herself from the defendant continuously from March 30, 1938, to the date of the answer.

The defendant filed a counter-claim for divorce on May 30, 1939, averring that the plaintiff deserted the defendant on March 30, 1938, and starting her with absolutely no income, but, and on other enumerated dates.

The plaintiff answered the counter-claim and denied the charges of desertion and adultery.

The testimony which is relied on the statement of this court

by the defendant is that the time consumed by the litigation cannot be reckoned in the calculation of the statutory period of desertion and this rule applies alike to pending proceedings for separate maintenance under the statute and for divorce, and the defendant cites in support of this suggestion the case of Floberg v. Floberg, 358 Ill. 636; In re Schriver's Estate, 289 Ill. App. 581.

The defendant calls our attention to the facts as they appear from the record filed in this case; that the parties separated on March 30, 1938, and that the plaintiff filed her complaint for separate maintenance on April 1, 1938, two days thereafter. The issues were joined and the cause was pending and undetermined on May 24, 1939, when the plaintiff filed her amended complaint for divorce, alleging that the defendant was guilty of willful desertion since March 30, 1938, and the defendant contends that the amended complaint charged desertion for a period of two days at the time the original complaint was filed. The amended complaint did not enlarge the period of desertion on the part of the defendant from two days at the time the original complaint was filed to more than one year when the amended complaint was filed 13 months thereafter. The Supreme Court in Floberg v. Floberg, 358 Ill. 636, upon a like question said:

"The next issue for decision under the facts in the record is whether the trial court, as a matter of law, was correct in awarding to the appellee a decree of divorce. * * * While the point is not raised by the appellant that the full period of one year's desertion had not run at the time of the filing of the cross-bill, yet it is the duty of the court in this character of a case of its own motion to examine that question and determine whether the complainant had deserted the appellee for the period of one full year prior to the filing of the cross-bill. The complainant's bill was filed about four months after the separation of the parties. It is manifest that the one-year period during which it is charged the complainant deserted her husband embraces the time during which her bill against her husband was pending and undisposed of in the circuit court. Her suit for separate maintenance, as the action under the statute is commonly designated, corresponds with the divorce of a mensa et thoro, which was the only kind of divorce granted by the ecclesiastical law. The general rule is where a suit for divorce is brought and the same is pending between the parties to the marriage contract, the parties are not only justified in living apart but necessarily must do so. Such living separate and apart does not constitute willful desertion

by the petition is that the time measured by the litigation cannot be relevant in the determination of the statutory period of desertion and this rule applies alike to pending proceedings for separate maintenance under the statute and for divorce, and the defendant cites in support of this suggestion the case of Fisher v. Fisher, 288 Ill. 629; In re Schriver's Estate, 308 Ill. App. 681.

The defendant calls our attention to the facts as they appear from the record filed in this case: that the parties separated on March 30, 1928, and that the plaintiff filed her complaint for separate maintenance on April 1, 1928, two days thereafter. The issues were joined and the cause was pending and undetermined on May 31, 1929, when the plaintiff filed her amended complaint for divorce, alleging that the defendant was guilty of willful desertion since March 30, 1928, and the defendant answered that the amended complaint charged desertion for a period of two days at the time the original complaint was filed. The amended complaint did not enlarge the period of desertion on the part of the defendant from two days at the time the original complaint was filed to more than one year when the amended complaint was filed 14 months thereafter. The decree court in Fisher v. Fisher, 288 Ill. 629, gave a like question said:

"The mere lapse of the statutory period of two years is the reason for the trial court, in a matter of law, was correct in overruling the application a decree of divorce. " " " While the point is not raised by the complaint that the full period of one year's desertion had not run at the time of the filing of the cross-bill, yet it is the duty of the court in this situation of a suit of its own motion to examine that question and determine whether the complainant had complied the requisite for the period of one full year prior to the filing of the cross-bill. The court in-bill was filed about four months after the separation of the parties. It is manifest that the two-year period during which it is charged the complainant deserted her husband extends the time during which her bill against her husband was pending and adjudged of in the circuit court. For suit for separate maintenance, as the action under the statute is commonly designated, corresponds with the divorce of a mensa et thoro, which was the only kind of divorce created by the ecclesiastical law. The grounds upon which a decree a suit for divorce is brought and the same in putting between the parties the marriage contract, the parties are not only justified in living apart but necessarily must do so. Such living separate and apart does not constitute willful desertion

without reasonable cause within the meaning of the Divorce act. It would be incompatible with a pending suit for the dissolution or modification of the marriage contract for the parties to live together. If the suit is carried on bona fide, it is not incumbent, during its pendency, upon either party to resume the marital status. The time so consumed by the litigation cannot be reckoned in the calculation of the statutory period of desertion. The rule applies alike to pending proceedings for separate maintenance under the statute and for divorce. It is 'time out.' (and cases therein cited) * * * In the case at bar, deducting the time occupied in the litigation occasioned by the wife's suit, the requirement of the statute of willful desertion for one year without reasonable cause is not met. The decree for divorce granted the appellee is not sustained by the law of the State.

The decree, in so far as it dismisses the complainant's bill for want of equity, will be affirmed, and in so far as it granted to the appellee a divorce and other relief on his cross-bill the decree will be reversed, with directions to dismiss the cross-bill (or counter-claim) for want of equity."

The defendant then suggests that deducting the time during which the plaintiff's complaint for separate maintenance was pending - 13 months and 24 days - there was a separation of only 2 days, far short of the requirement of the statute of willful desertion for one year without reasonable cause. And it does appear from the suggestion offered that in applying the doctrine announced in the Floberg case to the instant case it is evident that the decree in the case at bar should be reversed with directions to dismiss the amended complaint for divorce for want of equity, or this court, under its powers, may enter its final judgment dismissing the amended complaint for divorce and other relief for want of equity.

The plaintiff's answer to the suggestion offered is that it appears from the common law record in this cause that a hearing was had and all parties were present at said hearing, and at no time were there any objections to the jurisdiction of the court, and thereafter said decree was entered and no motion was made attacking the jurisdiction of the court. Under these circumstances as held in Timmermann v. Industrial Commission, 305 Ill. 485, and under the rulings in this court in former decisions, the defendant cannot raise in this court the question of the jurisdiction of the Superior Court. However, the defendant answers this point of the plaintiff by stating that it is not applicable to the instant case, and as we have already indicated, the defendant relies on the case

without reasonable cause within the meaning of the Divorce Act. It would be impossible with a pending suit for the dissolution or nullification of the marriage contract for the parties to live together. If the suit is carried on *bona fide*, it is not insurmount, during its pendency, even either party is remote the marital status. The time as commenced by the initiation cannot be included in the calculation of the statutory period of desertion. The rule applies also to pending proceedings for separate maintenance under the statute and for divorce. It is 'time out,' (and cases thereon cited) " " in the case at bar, deducting the time occupied in the initiation consistent by the wife's suit, the maintenance of the statute of wilful desertion for one year without reasonable cause is not met. The decree for divorce granted the appellee is not sustained by the law of the state.

The decree, in so far as it dissolves the contention's suit for want of equity, will be affirmed, and in so far as it granted to the appellee a divorce and other relief on his cross-bill the decree will be reversed, with directions to dismiss the cross-bill (or counter-claim) for want of equity.'

The defendant then suggests that deducting the time during which the plaintiff's complaint for separate maintenance was pending - 12 months and 24 days - there was a separation of only 3 days, far short of the requirement of the statute of wilful desertion for one year without reasonable cause. And it does appear from the suggestion offered that in applying the doctrine announced in the *Flaherty* case to the instant case it is evident that the decree in the case at bar should be reversed with directions to dismiss the amended complaint for divorce for want of equity, or this court, under its powers, may enter its final judgment dismissing the amended complaint for divorce and other relief for want of equity.

The plaintiff's answer to the suggestion offered is that it appears from the common law record in this cause that a hearing was had and all parties were present at said hearing, and at no time was there any objections to the jurisdiction of the court, and thereafter said decree was entered and no motion was made attacking the jurisdiction of the court. Under these circumstances as held in *Thompson* v. *Industrial Commission*, 3CS 111. 4d, and under the rulings in this court in former decisions, the defendant cannot raise in this court the question of the jurisdiction of the Superior Court. However, the defendant answers this point of the plaintiff by stating that it is not applicable to the instant case, and as we have already indicated, the defendant relies on the case

of Floberg v. Floberg, 358 Ill. 636, which seems to be in point.

It appears from the Floberg case that the issue for decision by the Supreme Court was whether the trial court as a matter of law was correct in awarding to the appellee a decree for divorce. The Supreme Court held that while the point was not raised by the appellant that the full period of one year's desertion had not run at the time of the filing of the cross-bill, yet it was the duty of the court in that character of case to examine that question and determine whether the complainant had deserted the plaintiff for the period of one full year prior to the filing of the cross-bill in that case, but the plaintiff suggests that in the Floberg case the Supreme Court had the entire record before it. However, it does appear from the decree: "That, from the law and the evidence presented, the defendant wilfully deserted and absented himself from the plaintiff without any reasonable cause and through his fault for the space of over one year immediately prior to the filing of the amended complaint, as charged in plaintiff's complaint for divorce," and the issue that has been presented is whether the requirement of the statute of wilful desertion for one year without reasonable cause is met, and if this court deducts the time occupied in the litigation occasioned by plaintiff's suit, this requirement was not met.

Other questions are raised in this case, however for the reasons we have stated, the decree is reversed and the cause is remanded with directions that the court dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS

DENIS E. SULLIVAN, P. J.
and BURKE, J. CONCUR.

of Hobson v. Hobson, 388 Ill. 438, which seems to be in point.

It appears from the Hobson case that the issue for decision by the Supreme Court was whether the trial court as a matter of law was correct in granting to the appellee a decree for divorce. The Supreme Court held that while the point was not raised by the appellant that the full period of one year's desertion had not run at the time of the filing of the cross-bill, yet it was the duty of the court in that character of case to examine that question and determine whether the complainant had pleaded the plaintiff for the period of one full year prior to the filing of the cross-bill in that case, but the plaintiff complaints that in the Hobson case the Supreme Court had the entire record before it. However, it does appear from the decree, "That, from the law and the evidence presented, the defendant wilfully deserted and absented himself from the plaintiff without any reasonable cause and through his fault for a space of over one year immediately prior to the filing of the amended complaint, as charged in plaintiff's complaint for divorce," and the issue that has been presented is whether the requirement of the statute of Illinois pertaining to the year desertion cause is met, and if this court reduces the time complained in the litigation occasioned by plaintiff's suit, this requirement is met not.

Other questions are raised in this case, however for the reasons we have stated, the decree is reversed but the cause is remanded with directions that the court dismiss the bill for want of equity.

BARNETT AND CONNORS
GIN LAW FIRM

DAVID A. SULLIVAN, P. J.
and EDWIN A. DUNCAN.

304 Ill. App.

40993

HENRY SEEGO,
Plaintiff-Appellee,

v.

F. C. OWEN and E. BOUGHAN, individually and as a partnership doing business as ROSELAND MOTOR SALES,
Defendants-Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

304 I.A. 594

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered in the Municipal Court of Chicago against the defendants for $167.50, and is an action instituted to recover damages for the breach of an alleged contract in writing for the purchase of a new 1937 Plymouth automobile.

The defendants in this action are F. C. Owen and E. Boughan, who are partners doing business as the Roseland Motor Sales. A Mr. A. J. Thorpe, who was employed by the Roseland Motor Sales, was a salesman at the time of making the contract in question, according to the evidence of Mr. Boughan, the defendant partner. Mr. Thorpe represented himself to the plaintiff as sales manager and partner of the Roseland Motor Sales, and to justify this statement produced a business card of the defendants, which he gave to the plaintiff. This business card showed the name of "A. J. Thorpe, Sales Manager" in the lower left-hand corner. The contract is a printed form, which was in general use by the defendants and was filled out in the blank spaces in the handwriting of Mr. Thorpe, which contract was taken from an order book which Mr. Thorpe produced. The contract was signed at the making thereof by the plaintiff and by Mr. Thorpe, the latter signing for and on behalf of the Roseland Motor Sales.

Everett Boughan, one of the defendant partners, testified that the defendants held Mr. Thorpe out to the public as a salesman; that the defendants had cards printed showing Mr.Thorpe's capacity with

HENRY SCHOO,
Plaintiff-appellee,

v.

T. O. OWEN and E. BOUGHAN, individually and as a partnership doing business as ROSELAND MOTOR SALES,
Defendants-appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered in the Municipal Court of Chicago against the defendants for $127.50, and is an action instituted to recover damages for the breach of an alleged contract in writing for the purchase of a new 1927 Plymouth automobile.

The defendants in this action are T. O. Owen and E. Boughan, who are partners doing business as the Roseland Motor Sales. A Mr. A. J. Thorpe, who was employed by the Roseland Motor Sales, was a salesman at the time of making the contract in question, according to the evidence of Mr. Boughan, the defendant partner. Mr. Thorpe represented himself to the plaintiff as sales manager and partner of the Roseland Motor Sales, and to justify this statement produced a business card of the defendants, which he gave to the plaintiff. This business card showed the name of "A. J. Thorpe, Sales Manager" in the lower left-hand corner. The contract is a printed form, which was in general use by the defendants and was filled out in the blank spaces in the handwriting of Mr. Thorpe, which contract was taken from an order book which Mr. Thorpe produced. The contract was signed at the making thereof by the plaintiff and by Mr. Thorpe, the latter signing for and on behalf of the Roseland Motor Sales.

Everett Boughan, one of the defendant partners, testified that the defendants held Mr. Thorpe out to the public as a salesman; that the defendants had cards printed showing Mr.Thorpe's capacity with

the defendants, and that Mr. Thorpe was at one time the sales manager of the defendants. The defendants had taken in trade from time to time used Plymouth cars. Boughan said he might have had a conversation with Mr. Edwards about two months after the making of this contract wherein he asked Mr. Edwards to endeavor to induce Mr. McCarthy and Mr. Seego to take Studebaker cars instead of the Plymouth cars they wanted.

Henry Seego, the plaintiff, testified that he first heard of Mr. Boughan, the defendant partner through Mr. Thorpe; that Mr. Thorpe said he would speak to Mr. Boughan about the subject matter of this contract; that he, the plaintiff, believed he talked to Mr. Boughan on the telephone on one of the occasions on which he telephoned the defendants' salesroom.

There is also the evidence of Hugh J. McCarthy, an attorney at law, who testified for the plaintiff, and from his evidence it appears that he was told by Mr. Edwards, who did business with the defendants for some time prior to the making of the contract, that Mr. Thorpe was the sales manager. Witness McCarthy telephoned the defendants' place of business about seven weeks after the making of the contract, and the girl who answered the telephone stated that she would let him speak to one of the partners. He, McCarthy, then thought that the man he spoke to was the defendant partner, Owen, and he asked Mr. Owen whether Mr. Thorpe was the sales manager of the defendants.

The plaintiff contends that the defendants' entire brief and argument sets forth that a valid and binding contract was not entered into between the plaintiff and the defendants because Mr. Thorpe was not authorized to negotiate a contract of this nature. As a corollary to this they say that one cannot in law prove the authority of the agent by what the agent does or says. They point to the contract in this instance, which, among other things, stipulates

the defendants, and that Mr. Thorpe was at one time the sales manager of the defendants. The defendants had taken in trade from time to time used Plymouth cars. Bougham said he might have had a conversation with Mr. Edwards about two months after the making of this contract wherein he asked Mr. Edwards to endeavor to induce Mr. McCarthy and Mr. Seego to take Studebaker cars instead of the Plymouth cars they wanted.

Henry Seego, the plaintiff, testified that he first heard of Mr. Bougham, the defendant partner through Mr. Thorpe; that Mr. Thorpe said he would speak to Mr. Bougham about the subject matter of this contract; that he, the plaintiff, believed he talked to Mr. Bougham on the telephone on one of the occasions on which he telephoned the defendants' salesroom.

There is also the evidence of Hugh J. McCarthy, an attorney at law, who testified for the plaintiff, and from his evidence it appears that he was told by Mr. Edwards, who did business with the defendants for some time prior to the making of the contract, that Mr. Thorpe was the sales manager. Witness McCarthy telephoned the defendants' place of business about seven weeks after the making of the contract, and the girl who answered the telephone stated that she would let him speak to one of the partners. Mr. McCarthy, then thought that the man he spoke to was the defendant partner, Owen, and he asked Mr. Owen whether Mr. Thorpe was the sales manager of the defendants.

The plaintiff contends that the defendants' entire brief and argument sets forth that a valid and binding contract was not entered into between the plaintiff and the defendants because Mr. Thorpe was not authorized to negotiate a contract of this nature. As a corollary to this they say that one cannot in law prove the authority of the agent by what the agent does or says. They point to the contract in this instance, which, among other things, stipulates

that "The order is not valid unless signed and accepted by an officer of this company and purchaser's credit has been O.K.'d by Finance Company as to any deferred balance."

Plaintiff's answer to this contention of the defendants is that a valid and binding obligation was created with the defendants on the theory that Mr. Thorpe was invested with an apparent authority to negotiate this contract because of the acts of the defendants, and therefore the defendants now are estopped to deny that Mr. Thorpe was invested with authority to make a valid and binding contract as to the defendants.

The defendants question the statement of the plaintiff regarding the amount of damages which it is alleged was sustained by the plaintiff, and contend that a different interpretation should be made of the facts in the record. The plaintiff argues that at the time the plaintiff signed the alleged contract sued upon, to-wit, April 28, 1937, he was to get a new automobile, a 1937 Plymouth De Luxe Sedan, and that therefore, on October 9, 1937, when he purchased his automobile, he was entitled to the new model, or a 1938 Plymouth De Luxe Sedan. Of course, the plaintiff seeks to recover damages based upon the contract in question, which provided that a 1937 Plymouth De Luxe Sedan would be delivered when the plaintiff had paid the amount of $152.50, in addition to delivery of his car to the defendants. This was never done.

The basis upon which the amount of the judgment of $167.50 was entered, as suggested by the plaintiff, was (a) under this contract the plaintiff was to pay $152.50 together with delivery of his old car for a new 1937 Plymouth De Luxe Sedan; (b) under the contract wherein the plaintiff purchased the new car on October 9, 1937, the plaintiff was obliged to pay the sum of $325. in addition to his old car. The court awarded damages to the plaintiff and entered

that "The order is not valid unless signed and accepted by an officer of this company and purchaser's credit has been O.K.'d by Finance Company as to any deferred balance."

Plaintiff's answer to this contention of the defendants is that a valid and binding obligation was created with the defendants on the theory that Mr. Thorpe was invested with an apparent authority to negotiate this contract because of the acts of the defendants, and therefore the defendants now are estopped to deny that Mr. Thorpe was invested with authority to make a valid and binding contract as to the defendants.

The defendants question the statement of the plaintiff regarding the amount of damages which it is alleged was sustained by the plaintiff, and contend that a different interpretation should be made of the facts in the record. The plaintiff argues that at the time the plaintiff signed the alleged contract sued upon, to-wit, April 20, 1937, he was to get a new automobile, a 1937 Plymouth De Luxe sedan, and that therefore, on October 9, 1937, when he purchased his automobile, he was entitled to the new model, or a 1938 Plymouth De Luxe Sedan. Of course, the plaintiff seeks to recover damages based upon the contract in question, which provided that a 1937 Plymouth De Luxe Sedan would be delivered when the plaintiff had paid the amount of $153.50, in addition to delivery of his car to the defendants. This was never done.

The basis upon which the amount of the judgment of $187.50 was entered, as suggested by the plaintiff, was (a) under this contract the plaintiff was to pay $153.50 together with delivery of his old car for a new 1937 Plymouth De Luxe Sedan; (b) under the contract wherein the plaintiff purchased the new car on October 9, 1937, the plaintiff was obliged to pay the sum of $325, in addition to his old car. The court awarded damages to the plaintiff and entered

judgment for $167.50, which was the difference between the amount of money the plaintiff was to pay under the contract - $152.50, and the amount of money the plaintiff paid on the purchase of the new car, $325.

We are not inclined to agree with the theory of the court in arriving at the amount of damages which the plaintiff has recovered in this action.

Damages must be based upon the contract which the plaintiff alleged was entered into between the parties. The general rule upon the question of damages is that recovery is based upon the difference between the contract price and the market value at the time of the breach of contract.

In Underground Construction Co. v. Sanitary District of Chicago, 367 Ill. 360, the court announced the rule, quoting from the case of Hadley v. Baxendale, 5 English Ruling Cases 502, that -

> "The damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising naturally - that is, according to the usual course of things - from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

As we have indicated, the plaintiff seeks to recover the difference in price of a 1938 model car and a 1937 car, which was contracted for as stated in this opinion. Under the circumstances, we are of the opinion that the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P. J.
BURKE, J. CONCUR.

judgment for $167.50, which was the difference between the amount of money the plaintiff was to pay under the contract - $152.50, and the amount of money the plaintiff paid on the purchase of the new car, $320.

We are not inclined to agree with the theory of the court in arriving at the amount of damages which the plaintiff has recovered in this action.

Damages must be based upon the contract which the plaintiff alleged was entered into between the parties. The general rule upon the question of damages is that recovery is based upon the difference between the contract price and the market value at the time of the breach of contract.

In Underground Construction Co. v. Sanitary District of Chicago, 327 Ill. 380, the court announced the rule, quoting from the case of Hadley v. Baxendale, 9 English Ruling Cases 503, that -

> "The damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising naturally - that is, according to the usual course of things - from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

As we have indicated, the plaintiff seeks to recover the difference in price of a 1928 model car and a 1927 car, which was contracted for as stated in this opinion. Under the circumstances, we are of the opinion that the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P. J.
BURKE, J. CONCUR.

304 ILL App.

41015

MARIAN SEGAL, also known as MARIAN SEEGER, Plaintiff - Appellee, v. LOUIS FEINBERG and BENJAMIN E. SEGAL, also known as B. EDWARD SEEGER, Defendants. On Appeal of LOUIS FEINBERG, Defendant - Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

304 I.A. 595

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This suit was filed by the plaintiff on May 15, 1939, and is based upon a surety bond or contract executed by her husband, Benjamin E. Segal, as principal, and Louis Feinberg, the defendant and appellant here as surety, for the sum of $300. claimed to be due at the rate of $100 per month for the months of March, April, and May, 1939, which the plaintiff alleged the principal failed to pay. Summary judgment was entered against Louis Feinberg upon the pleadings and the affidavit for summary judgment and the counter affidavits filed by the defendant, and this judgment was entered on July 19, 1939, appeal from which is taken by the defendant Louis Feinberg.

The parties defendant are sued upon a bond dated April 28, 1938, executed by them pursuant to a decree entered in the Circuit Court of Cook County between Marian Segal, plaintiff, and the defendant Benjamin E. Segal. The bond was executed by Benjamin E. Segal as principal and Feinberg as surety in the sum of $3,100; it referred to the divorce proceedings, particularly to the decree rendered therein which required Segal to pay his wife the sum of $3,100 in installments of $100 monthly, beginning June 1, 1938 and continuing thereafter on the corresponding day of each month until the sum of $3,100 was fully paid.

304 I.A. 595

MARIA SEGEL, also known as
MARIA SEGEL,

Plaintiff - Appellee,

v.

LOUIS FEINBERG and BENJAMIN K. SEGEL,
also known as B. SEGEL FEINBERG,

Defendants.

On Appeal of Louis Feinberg.

Defendant - Appellant.

MR. JUSTICE MANN DELIVERED THE OPINION OF THE COURT.

This suit was filed by the plaintiff on May 15, 1939, and is based upon a surety bond or contract executed by her husband, Benjamin K. Segel, as principal, and Louis Feinberg, the defendant and appellant here as surety, for the sum of $300, claimed to be due at the rate of $100 per month for the months of March, April, and May, 1938, when the plaintiff alleged the principal failed to pay. Summary judgment was entered against Louis Feinberg upon the pleadings and the affidavit for summary judgment and the counter affidavits filed by the defendant, and this judgment was entered on July 14, 1939, appeal from which is taken by the defendant Louis Feinberg.

The parties defendant are each upon a bond dated April 22, 1938, executed by them pursuant to a decree entered in the Circuit Court of Cook County between Marian Segel, plaintiff, and the defendant Benjamin K. Segel. The bond was executed by Benjamin K. Segel as principal and Feinberg as surety in the sum of $2,100; it referred to the divorce proceedings, particularly to the decree contained therein which required Segel to pay his wife the sum of $2,100 in installments of $100 monthly, beginning June 1, 1938 and continuing thereafter on the corresponding day of each month until the sum of $2,100 was fully paid.

The defendants herein paid the first nine installments accruing on the bond, that is, all installments accruing up to and including the February 1939 installment. Feinberg personally paid the December 1938 installment. Sometime during the month of February 1939, defendant Segal became confined in the County Jail at Wheaton, Illinois. He remained so confined during the months of March, April and May. The fact of Segal's incarceration was known to both the plaintiff and Feinberg, the defendant. Under date of April 28, 1939, Feinberg sent a letter to the plaintiff informing her that he "apprehended" that the principal in the bond "is likely to become insolvent and also to remove himself from the State of Illinois without discharging his contract as principal under said bond". The letter concluded as follows:

> "As you also know monies have accrued under said bond or contract and he, the principal has not paid certain sums under said Bond and that a right of action has accrued to you on the contract or surety bond.
>
> I do, therefore, hereby demand and require of you that you forthwith sue and take immediate action upon said contract or surety bond against Benjamin M. Segal, also known as B. Edward Seeger.
>
> Very truly yours,
> Louis Feinberg."

On May 5, 1939, the plaintiff, by her attorney, notified Feinberg that his principal was in default in the sum of $300. under the terms of the agreement with the plaintiff and the decree of court, and demanded that Feinberg make good the default of his principal, referring to Feinberg's letter of April 28, 1939, the plaintiff informed him that Segal was still in jail. Accordingly, there was no possibility of his leaving the jurisdiction. The plaintiff thereupon filed suit against both Segal and Feinberg for installments falling due in the months of March, April and May 1939; Segal, still being in jail in Wheaton, the summons of the Municipal Court of Chicago was returned by the bailiff of that court, served upon Feinberg, "not found" as to Segal. In his affidavit of defense Feinberg set up his writing of April 28th and alleged that the

The defendants herein paid the first nine installments accruing on the bond, that is, all installments accruing up to and including the February 1932 installment. Reinberg personally paid the December 1932 installment. Sometime during the month of February 1932, defendant Segal became confined in the County Jail at Wheaton, Illinois. He remained so confined during the months of March, April and May. The fact of Segal's incarceration was known to both the plaintiff and Reinberg, the defendant. Under date of April 28, 1932, Reinberg sent a letter to the plaintiff informing her that he "apprehended" that the principal in the bond "is likely to become insolvent and also to remove himself from the State of Illinois without discharging his contract as principal under said bond". The letter concluded as follows:

"In you also know matters have occurred under said bond or contract and he, the principal has not paid certain sums under said bond and that a right of action has accrued to you in the contract or surety bond.

I am, therefore, hereby issuing and serving of you that you forthwith sue and take immediate action upon said contract or surety bond against principal E. Segal, also known as E. Ehrend Segal.

Very truly yours,

Louis Reinberg."

On May 5, 1932, the plaintiff, by her attorney, notified Reinberg that his principal was in default in the sum of $300, under the terms of the agreement with the plaintiff and the decree of court, and demanded that Reinberg make good the default of his principal, referring to Reinberg's letter of April 28, 1932, the plaintiff informed him that Segal was still in jail. Accordingly, there was no possibility of his leaving the jurisdiction. The plaintiff thereupon filed suit against both Segal and Reinberg for installments falling due in the months of March, April and May 1932; Segal, still being in jail in Wheaton, the summons of the municipal Court of Chicago was returned by the bailiff of that court, served upon Reinberg, "not found" as to Segal. In his affidavit of defense Reinberg set up his writing of April 28th and alleged that the

plaintiff did not within a reasonable time and with due diligence commence suit against Segal "and further did not prosecute any suit to final judgment and execution."

A motion for summary judgment supported by her affidavit was made by the plaintiff. The defendant resisted the motion by setting up, by counter affidavit, the claimed defense based upon the alleged failure of the plaintiff to sue Segal.

Thereafter, on November 9, 1939, an alias summons was served by the bailiff of the Municipal Court of Chicago on the defendant Segal, and a judgment in the amount of $300 and costs, being for the same installments involved in this controversy, was entered against Segal on November 22, 1939, he being in default for want of an appearance. Execution on said judgment was sued out on November 25, 1939, served by the bailiff on Segal on November 27, 1939, and returned by the bailiff on December 7, 1939, no part satisfied.

The defendant relied as a defense of the action of the plaintiff upon Ch. 132, Sec. 1, Ill. Rev. Stats. 1939, entitled, "Sureties". This section provides as follows:

> "Be it enacted by the people of the State of Illinois, represented in the General Assembly: That when any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is likely to become insolvent or to remove from the state, without discharging the contract, if a right of action has accrued on the contract, he may, by writing, require the creditor forthwith to sue upon the same; and unless such creditor shall within a reasonable time, and with due diligence, commence suit thereon, and prosecute the same to final judgment and execution, the surety shall be discharged; but no such discharge shall in any case affect the rights of the creditor against the principal debtor."

The defendant Feinberg contends that up to the time of the filing of the amended defense on July 7, 1939, nor up to the time of the entry of the summary judgment against the defendant, which was on July 19, 1939, was there any action taken against the principal Benjamin E. Segal, also known as B. Edward Seeger, and it follows that no judgment or execution was effected against said principal in

plaintiff did not within a reasonable time and with due diligence commence suit against Segal "and further did not prosecute any suit to final judgment and execution."

A motion for summary judgment supported by her affidavit was made by the plaintiff. The defendant resisted the motion by setting up, by counter affidavit, the claimed defense based upon the alleged failure of the plaintiff to sue Segal.

Thereafter, on November 9, 1929, an alias summons was served by the bailiff of the Municipal Court of Chicago on the defendant Segal, and a judgment in the amount of $300 and costs, being for the same installments involved in this controversy, was entered against Segal on November 22, 1929, by default in default for want of an appearance. Execution on said judgment was sued out on November 25, 1929, served by the bailiff on Segal on November 27, 1929, and returned by the bailiff on December 7, 1929, no part satisfied.

The defendant relies as a defense of the action of the plaintiff upon Ch. 122, sec. 1, ill. Ann. Stats. 1929, entitled "Sureties". This section provides as follows:

"Be it enacted by the people of the state of Illinois, represented in the General Assembly: That when any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is likely to become insolvent or to remove from the state, without discharging the contract, it shall be lawful for such surety to make his affidavit, by writing, require the creditor forthwith to sue upon the same; and unless such creditor shall within a reasonable time, and with due diligence, commence suit thereon, and prosecute the same to final judgment and execution, the surety shall be discharged; but no such discharge shall in any case affect the rights of the creditor against the principal debtor."

The defendant Feinberg contends that up to the time of the filing of the amended defense on July 7, 1930, nor up to the time of the entry of the summary judgment against the defendant, which was on July 12, 1930, was there any action taken against the principal debtor, Segal, also known as H. Edward Seager, and it follows that no judgment or execution was entered against said principal in

accordance with the statute above quoted, and the defendant quotes from the case of Hyman v. Yeomans, 84 Ill. 403, where the court said:

> "We think appellant was entitled to have had the suit brought at once, and that if the delay in bringing the suit wrought, or is likely to work, injury to him, he is entitled to be discharged. At all events, he should be allowed to interpose this defense, and have the questions of fact passed upon by a jury, unless he has waived his right."

and upon the question of what was a reasonable time, cites the case of People ex rel. Nudelman v. Superior Petroleum Co., 372 Ill. 546. This court is of the opinion that what is a reasonable time is determined by the circumstances of each case, and in passing upon what was a reasonable time within which theplaintiff must act after receiving the letter requesting that the plaintiff forthwith sue and take immediate action upon the contract or surety bond executed by the parties, it is necessary to consider the facts as we have them before us. While it is true that the defendant Feinberg mailed a letter under date of April 28, 1939, as we have suggested, the plaintiff by her attorney notified Feinberg on May 5, 1939, that there was a default in the payment of the sum of $300, provided for by the terms of the agreement between the parties, and made the demand that Feinberg make good the default of his principal, and in the same letter, in reply to Feinberg's letter of April 28, the plaintiff informed him that Segal, the principal debtor, was confined in jail and that there was no possibility of his leaving the jurisdiction, and on May 5, 1939, the plaintiff filed suit against both Segal and Feinberg for the installments due, and summons was issued in the Municipal Court, and the bailiff of that court served Feinberg, and "not found" as to Segal, the principal debtor.

From the affidavit of Feinberg his defense alleges that in view of his writing the letter of April 28, 1939, the plaintiff did not within a reasonable time and with due diligence commence suit, and did not prosecute any suit to final judgment and execution, and it

accordance with the statute above quoted, and the defendant moves from the bar of Dunne v. Freeman, 84 Ill. 434, where the court said:

> "The claim appellant was entitled to have had the suit brought at once, and that if the delay in bringing the suit arrought, or is likely to work injury to him, he is entitled to be discharged. It is all words, he should be allowed to interpose his defense, and have the questions of fact passed upon by a jury, unless he has waived his right."

and upon the question of what was a reasonable time, cites the case of People ex rel. Budlong v. Superior Petroleum Co., 272 Ill. 546. This court is of the opinion that what is a reasonable time is determined by the circumstances of each case, and in passing upon what was a reasonable time within which the plaintiff must act after receiving the letter requesting that the plaintiff forthwith sue and take immediate action upon the contract or surety bond executed by the parties, it is necessary to consider the facts as we have them before us. While it is true that the defendant Feinberg mailed a letter under date of April 28, 1932, as we have suggested, the plaintiff by her attorney notified Feinberg on May 5, 1932, that there was a default in the payment of the sum of $800, provided for by the terms of the agreement between the parties, and made the demand that Feinberg make good the default of his principal, and in the same letter, in reply to Feinberg's letter of April 28, the plaintiff informed him that Segal, the principal debtor, was confined in jail and that there was no possibility of his leaving the jurisdiction, and on May 5, 1932, the plaintiff filed suit against both Segal and Feinberg for the indebtedness due, and summons was issued in the municipal court, and the sheriff of that county served Feinberg, and "not found" as to Segal, the principal debtor.

From the affidavit of Feinberg his defense alleges that in view of his writing the letter of April 28, 1932, the plaintiff did not within a reasonable time and with due diligence commence suit, and did not prosecute any suit to final judgment and execution, and it

is upon the issues that were before the court that a motion for a summary judgment supported by her affidavit was made by the plaintiff. The defendant resisted this motion by setting up, by counter affidavit, the claimed defense based upon the alleged failure of the plaintiff to sue Segal. From the facts as they appear and the admission that the amount is due, the trial court was justified in entering a summary judgment for the amount which had accrued, and in our opinion there was no delay in instituting the action to recover the amount due against Feinberg and Segal.

It does appear however that on November 9, 1939, an alias summons was served by the bailiff of the Municipal Court on the defendant Segal, and a judgment for $300 and costs was entered against this defendant on November 22, 1939, he having defaulted for want of an appearance, and upon this judgment an execution was issued on November 25, 1939, served by the bailiff on Segal and returned on December 7, 1939, no part satisfied. So, we believe in view of the facts as we have them before us, that the plaintiff acted promptly and that there was no delay, nor were there any facts which would indicate that delay caused insolvency, or that Benjamin E. Segal left the State.

There is one further question which we think we should consider, and that is did the court err in entering this summary judgment, where the defendant Feinberg requested that the jury be empaneled. As we have stated, it appears from the pleadings that the amount of the summary judgment was for the sums which became due, and there does not seem to be any defense as to this question. Therefore, as it is for the jury to pass upon disputed questions of fact and there being no issue upon the facts, the court did not err in entering the summary judgment in question.

is upon the issues that were before the court that a motion for a summary judgment supported by her affidavit was made by the plaintiff. The defendant resisted this motion by setting up, by counter affidavit, the claimed defense based upon the alleged failure of the plaintiff to sue Segal. From the facts as they appear and the admission that the amount is due, the trial court was justified in entering a summary judgment for the amount which had accrued, and in our opinion there was no delay in instituting the action to recover the amount due against Weinberg and Segal.

It does appear however that on November 2, 1929, an alias summons was served by the bailiff of the Municipal Court on the defendant Segal, and a judgment for $300 and costs was entered against this defendant on November 22, 1929, he having defaulted for want of an appearance, and upon this judgment an execution was issued on November 26, 1929, served by the bailiff on Segal and returned on December 7, 1929, no part satisfied. So, we believe in view of the facts as we have them before us, that the plaintiff acted promptly and that there was no delay, nor were there any facts which would indicate that delay caused insolvency, or that Benjamin K. Segal left the State.

There is one further question which we think we should consider, and that is did the court err in entering this summary judgment, where the defendant Weinberg requested that the jury be empanelled. As we have stated, it appears from the pleadings that the amount of the summary judgment was for the sums which became due, and there does not seem to be any defense as to this question. Therefore, as it is for the jury to pass upon disputed questions of fact and there being no issue upon the facts, the court did not err in entering the summary judgment in question.

In the case of Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, the court said:

> "The New York, Michigan and the District of Columbia summary judgment rules and statutes were held constitutional when attacked on the ground that they permitted the court to deprive defendant of his right to a jury trial. (Citing cases). The function of a jury is to decide disputed issues of fact. But it is obvious that where no such issue is presented there can be no denial of the right to a jury trial."

See also Kellogg v. Kellogg, 302 Ill. App. 604.

We are unable to agree with the theory which is presented by the defendant that from the authorities cited the plaintiff did not within a reasonable time and with due diligence commence suit and prosecute the same to final judgment.

For the reasons stated in the opinion, the judgment entered in the cause is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

In the case of *Tarkoff Construction Corp.* v. *Bernstein*, 270 III. App. 201, the court said:

> "The New York, Michigan and the District of Columbia summary judgment rules and statutes were held constitutional when attacked on the ground that they permitted the court to deprive litigants of his right to a jury trial. (Citing cases). The function of a jury is to decide disputed issues of fact. But it is obvious that where no such issue is presented there can be no denial of the right to a jury trial."

See also *Kellner* v. *Kellner*, 309 III. App. 206.

We are unable to agree with the theory which is presented by the defendant that from the authorities cited the plaintiff did not within a reasonable time and with due diligence commence suit and prosecute the case to final judgment.

For the reasons stated in the opinion, the judgment entered in the cause is affirmed.

JUDGMENT AFFIRMED.

DAVIS & MULLIGAN, P.J., AND DOVE, J., concur.

304

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Abstract

May ~~October~~ Term, A. D., 19~~38~~ 40

No. 1 R.H.

~~Term No. 3.~~

~~Agenda No. 3.~~

LILLIAN C. MEYERS,)
Plaintiff-Appellee,)
vs.)
CITY OF BELLEVILLE, ILLINOIS,)
Defendant-Appellant.)

Appeal from the Circuit Court of the County of St. Clair, Illinois.

304 I.A. 633

CULBERTSON, J.

This is an appeal from a judgment in the sum of $300.00 in favor of Plaintiff-Appellee, Lillian C. Meyers (hereinafter sometimes called Plaintiff), as against Defendant-Appellant, City of Belleville, Illinois (hereinafter sometimes called Defendant).

The complaint charged in substance that the City of Belleville had caused fresh paint to be placed upon the pavement on First Street in said City, at a distance about 90 feet south of the point where such street intersects West Main Street in said City, and had failed to place any sign or warning to the public, including the Plaintiff, that the paint was fresh and had recently been placed upon the street, and that Plaintiff stepped upon that portion of the pavement where the paint had been placed, as a result of which she slipped and fell, sustaining certain injuries.

The Defendant City denied the charges contained in the complaint. The evidence disclosed that a "No Parking" sign had been painted upon the street by an employee of the City of Belleville, with orange paint, in strips four inches in width, through use of a stencil. The work was begun at 8:30 in the morning.

This is an appeal from a judgment in the sum of $300.00 in favor of PLAINTIFF-APPELLEE, LILLIAN G. LEWIS (hereinafter sometimes called PLAINTIFF), of against DEFENDANT-APPELLANT, City of Bellevilla, Illinois (hereinafter sometimes called Defendant).

The complaint charged in substance that the City of Bellevilla had caused fresh paint to be placed upon the pavement on First Street in said City, at a distance about 20 feet south of the point where such street intersects West Main Street in said City, and had failed to place any sign or warning to the public, including the Plaintiff, that the paint was fresh and had recently been placed upon the street, and that Plaintiff stepped upon that portion of the pavement where the paint had been placed, as a result of which she slipped and fell, sustaining certain injuries.

The Defendant City denied the charges contained in the complaint. The evidence disclosed that a "No parking" sign had been placed upon the street by an employee of the City of Bellevilla, with orange paint, in order that there in white, through use of a stencil. The work was begun at 8:30 in the morning.

There was testimony to the effect that the paint was quick-drying paint, and was dry shortly thereafter. Plaintiff, who crossed the street at noon at such point (which was not at an intersection), testified that the paint was wet, and that the wet paint and uneven bricks in the pavement caused her to slip and fall. There was evidence that some of the orange paint adhered to Plaintiff's shoe after the fall. There was no charge in the complaint of any negligence due to unevenness of the street.

The cause was tried before a jury, which awarded the Plaintiff damages of $300.00, upon which verdict the judgment was entered. The Defendant City filed a Motion for Directed Verdict at the close of Plaintiff's evidence, and at the close of all the evidence, and, likewise, filed Motions for Judgment Notwithstanding the Verdict and for New Trial. Counsel for Defendant, in the brief filed in this Court, contends that the judgment entered is contrary to the law and the evidence, and that the Court erred in not sustaining the Motions filed on behalf of Defendant; and also, that Plaintiff should not be permitted to recover in this cause specifically because Plaintiff failed to show freedom from contributory negligence.

It is the unquestioned law of this state that a city is not an insurer against accidents occuring on the city streets. It is not required to foresee and provide against every possible danger or accident which may occur, but is only required to keep its streets and sidewalks in a reasonably safe condition for the accommodation of the people who use them (VILLAGE OF MANSFIELD v. MOORE, 124 Ill. 133; CITY OF GIBSON v. MURRAY, 216 Ill. 589; City OF CHICAGO v. BIXBY, 84 Ill. 82). It has been stated that the mere happening of an accident raises no presumption that it was caused by negligence (HUFF v. ILLINOIS CENTRAL RAILROAD CO., 362 Ill. 95; SPRING VALLEY COAL CO. v. BUZIS, 213 Ill. 341; CITY OF CHICAGO v. BIXBY, Supra).

The evidence presented on behalf of Plaintiff, taken as true, with all reasonable intendments therefrom most favorable to Plaintiff, simply establishes that Plaintiff slipped and fell on the pavement where she was crossing, which point of the pavement

There was testimony on the effect that the point was yesterday, and was dry shortly thereafter. Plaintiff, who crossed the street at noon at such point (which was not at an intersection), testified that the point was wet, and that the wet paint and uneven bricks in the pavement caused her to slip and fall. There was evidence that some of the orange paint appeared to plaintiff's shoe after the fall. There was no charge in the complaint of any negligence on the defendant's part.

The cause was tried before a jury, which awarded the plaintiff damages of $300.00, upon which verdict the judgment was entered. The defendant then filed a motion for directed verdict at the close of plaintiff's evidence, and at the close of all the evidence, and, thereafter, filed motions for judgment notwithstanding the verdict and for new trial. Counsel for defendant, in the brief filed in this Court, contends that the judgment entered is contrary to the law and the evidence, and that the court erred in not sustaining the motions filed on behalf of defendant; and also, that plaintiff should not be permitted to recover in this cause inasmuchsmuch as plaintiff failed to show freedom from contributory negligence.

It is the unquestioned law of this state that a city is not an insurer against accidents occurring on its city streets. It is not required to foresee and provide against every possible danger or accident which may occur, nor is it required to keep its streets and sidewalks in a reasonably safe condition for the accommodation of the people who use them (VI. CITY OF BLOOMFIELD v. ROSSER, 124 Ill. 133; WILT v. CITY OF CHICAGO, 6 Ill. App. 2d 1; CITY OF CHICAGO v. HILDE, 84 Ill. 98). It has been stated that the mere happening of an accident raises no presumption that it was caused by negligence (BURT v. ILLINOIS CENTRAL RAILROAD CO., 265 Ill. 49; SPRING VALLEY COAL CO. v. BONIS, 213 Ill. 241; CITY OF CHICAGO v. HILDE, Supra).

The evidence presented on behalf of plaintiff, taken as true, with all reasonable inferences therefrom most favorable to plaintiff, simply established that plaintiff slipped and fell on the pavement where she was crossing, which point of the pavement

was not a regular crosswalk, but was 90 feet from the intersection at which a crosswalk was located. The evidence, likewise, discloses that the city employee who had painted the sign with bright orange paint was using a quick-drying paint, which he testified was absolutely dry when he left. He testified that he had completed his painting about five or ten minutes to nine o'clock in the morning, and that while he was painting he had put out red flags, one at each corner and one in the center. He likewise testified that he stayed at the point where the sign was painted until it was dry so the traffic would not "rub it out."

Under the rules stated in WRITE v. CITY OF BELLEVILLE, 364 Ill. 577, when all the necessary elements of a cause of action are charged in a complaint, and there is some evidence in support of Plaintiff's case which, if taken as true, with all reasonable intendments therefrom most favorable to Plaintiff, tends to establish the negligence charged, Plaintiff is entitled to have such cause submitted to a jury, and the Court would not be authorized to direct a verdict, nor would the Court be justified in reversing without remanding in such case (KIRICH v. FORSCHNER CONTRACTING CO., 312 Ill. 343). We are, however, justified in reversing and remanding for new trial if it is our conclusion that the verdict and judgment are against the manifest weight of the evidence (ILLINOIS CENTRAL RAILROAD CO. v. SMITH, 208 Ill. 608).

The testimony of the city employee hereinabove referred to, together with the testimony of the witness who had accompanied Plaintiff, to the effect that she did not know whether the paint was wet or dry, as contrased with the testimony of Plaintiff in the Record, in the opinion of this Court, must lead to a conclusion that the verdict was contrary to the manifest weight of the evidence. The Court should, therefore, have granted a new trial on Motion of the Defendant.

For the reasons assigned, the judgment of the Circuit Court of St. Clair County is reversed, and the cause is remanded for new trial.

Abstract

Reversed and remanded.

but not a regular crossroads, but was 50 feet from the intersection at which a crossroads was located. The evidence, likewise, showed that the city employee who had painted the sign with bright orange paint was using a quick-drying paint, which he testified was absolutely dry when he left. He testified that he had completed his painting about five or ten minutes to nine o'clock in the morning, and that while he was painting he had put out red flags, all in each corner and one in the middle. He likewise testified that he stayed at the point where the sign was painted until it was dry so the traffic would not "rub it out."

Under the rules stated in <u>SMITH v. CITY OF SCHENAVIA</u>, 264 Ill. 277, when all the necessary elements of a cause of action are alleged in a complaint, and there is some evidence to support of liability also which, if taken as true, with all reasonable inferences therefrom most favorable to plaintiff, tends to establish the negligence charged, Plaintiff is entitled to have that cause submitted to a jury, and the court would not be authorized to direct a verdict, nor would the Court be justified in reversing without remanding in such case (<u>CITICK v. TRACTION CONSOLIDATED CO.</u>, 211 Ill. 590). We are, however, justified in reversing and remanding for any error if it is not conclusive that the verdict and judgment are against the manifest weight of the evidence (<u>PLAINTIFF SUPPLY CO. v. SMITH</u>, 277 Ill. 277).

The testimony of the city employee described relevant to, together with the testimony of the witness who had sustained plaintiff, to the effect that she fell on the same obstacle the paint had put on her, as contrasted with the testimony of Plaintiff is like manner, in the opinion of this Court, must lead to a conclusion that the verdict was contrary to the manifest weight of the evidence. The Court should, therefore, have granted a new trial on motion of the defendant.

For the reasons assigned, the judgment of the Circuit Court of St. Clair County is reversed, and the cause is remanded for new trial.

Reversed and remanded.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9475 Ag. No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM A.D. 1939

Robert Jenkins,
(Plaintiff below) Appellant,

vs.

Equitable Life Assurance Society of
the United States, a corporation,
(Defendant below) Appellee.

Appeal from Circuit
Court of Lake County,
Illinois.

WOLFE, P.J.

The plaintiff, Robert Jenkins, started suit in the Circuit Court of Lake County, on a certain policy of insurance executed and delivered by the defendant corporation to the plaintiff. In said suit the plaintiff asks to collect accrued monthly disability payments aggregating the sum of $2,100.00 together with interest thereon, for the alleged total and permanent disability of the said Robert Jenkins, within the meaning and in accordance with the provisions of the said policy of insurance.

In the complaint, the plaintiff alleged the issurance of the policy; that the payments for the same had all been properly made; that on February 6, 1930, he became totally and permanently disabled for work for profit, or reward, and at the time he was forced to quit work, the policy of insurance and the certificate thereof, was in full force and effect. The complainant asks damages in the sum of $1,000.00. The defendant filed its answer to the complaint and admitted that it had issued the insurance as alleged in the complaint, and that the plaintiff was covered by said policy of insurance, but denied that the plaintiff was totally and permanently disabled from performing any work or labor for profit, or reward. The original complaint and answer were amended several times and on January 26, 1939, by leave of Court, the ad

Con. No. 9475 Ag. No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

[illegible] Term, A.D. 1939

Robert Jenkins,
(Plaintiff below) [illegible],

vs.

Equitable Life Assurance Society of
the United States, a corporation,
(Defendant below) Appellee.

Appeal from Circuit
Court of Lake County,
Illinois.

WOLFE, P.J.

The plaintiff, Robert Jenkins, started suit in the Circuit Court of Lake County, on a certain policy of insurance executed and delivered by the defendant corporation to the plaintiff. In said suit the plaintiff seeks to collect accrued monthly disability payments aggregating the sum of $2,100.00 together with interest thereon, for the alleged total and permanent disability of the said Robert Jenkins, within the meaning and in accordance with the provisions of the said policy of insurance.

In the complaint, the plaintiff alleged the issuance of the policy; that the payments for the same had all been properly made; that on February 6, 1930, he became totally and permanently disabled for work for profit, or reward, and at the time he was forced to quit work, the policy of insurance and the certificate thereof, was in full force and effect. The complainant asks damages in the sum of $1,000.00. The defendant filed its answer to the complaint and admitted that it had issued the insurance as alleged in the complaint, and that the plaintiff was covered by said policy of insurance, but denied that the plaintiff was totally and permanently disabled from performing any work or labor for profit, or reward. The original complaint and answer were amended several times and on January 26, 1939, by leave of Court, the ad

damnum on behalf of the plaintiff, was increased to $3,000.00 The case was tried before a jury who found the issues in favor of the plaintiff, and assessed his damages at $2,100.00.

The defendant made a motion for judgment in its favor, notwithstanding the verdict. The motion was sustained and the Court entered judgment in favor of the defendant and against the plaintiff for costs. It is from this judgment that the appeal is prosecuted to this Court.

The evidence for the plaintiff tends to show that he was afflicted with a disease of the lungs and was incapacitated for work, at least part of the time, for which he claims compensation under the policy of insurance. The evidence for the defendant clearly shows that for a great part of the time for which the plaintiff claims compensation, he was actively engaged in W.P.A. projects and was being paid regularly for his services. Mr. Arthur Lunn testified that he was Foreman on a W.P.A. project starting in February 1938, and that he is acquainted with Robert Jenkins, the plaintiff; that Robert Jenkins worked under him from the first part of March 1938, on various jobs down to and including the time of the trial in January 1939.

Charles Heibor testified that he was a Commissioner on a W.P.A. project at Forrest Park in November 1935; that he was acquainted with the plaintiff, Robert Jenkins; that he first saw him when he reported on a job in North Chicago on November 13, 1935; that Robert Jenkins helped dig the ditches and shovel the dirt away; that he worked on this job until October 20, 1936; that he was working under his supervision the entire time; that he worked the full time that other men worked on the same job.

Adrian C. Bright testified that he was employed in the timekeeping department of the W.P.A. Office at Chicagp; that there is a permanent record kept of the number of hours worked and pay received by Robert Jenkins; that the record shows that Jenkins was assigned to work on the Project on November 4, 1935, but did not report for work on that p roject and was again assigned to another Project on November 20, 1935, and that he drew a check every two weeks for such pay; that

damnum on behalf of the plaintiff, was increased to $3,000.00. The case was tried before a jury who found the issues in favor of the plaintiff, and assessed his damages at $2,100.00.

The defendant made a motion for judgment in its favor, notwithstanding the verdict. The motion was sustained and the Court entered judgment in favor of the defendant and against the plaintiff for costs. It is from this judgment that the appeal is prosecuted to this Court.

The evidence for the plaintiff tends to show that he was afflicted with a disease of the lungs and was incapacitated for work, at least part of the time, for which he claims compensation under the policy of insurance. The evidence for the defendant clearly shows that for a great part of the time for which the plaintiff claims compensation, he was actively engaged in W.P.A. projects and was being paid regularly for his services. Mr. Arthur Lunn testified that he was Foreman on a W.P.A. project starting in February 1936, and that he is acquainted with Robert Jenkins, the plaintiff; that Robert Jenkins worked under him from the first part of March 1936, on various jobs down to and including the time of this trial in January 1939.

Charles Moisor testified that he was a Commissioner on a W.P.A. project at Forest Park in November 1935; that he was acquainted with the plaintiff, Robert Jenkins; that he first saw him when he reported on a job in North Chicago on November 19, 1935; that Robert Jenkins helped dig the ditches and shovel the dirt away; that he worked on this job until October 30, 1936; that he was working under his supervision the entire time; that he worked the full time that other men worked on the same job.

Adrian C. Wright testified that he was employed in the timekeeping department of the W.P.A. Office at Chicago; that there is a permanent record kept of the number of hours worked and pay received by Robert Jenkins; that the record shows that Jenkins was assigned to work on the Project on November 4, 1935, but did not report for work on that p roject and was again assigned to another Project on November 20, 1935, and that he drew a check every two weeks for such pay; that

he drew a check every two weeks from November 1935, until January 14, 1939.

Charles H. Neal testified that he was Operator of the North Chicago Water Works; that he is acquainted with Robert Jenkins, the plaintiff, and had occasion to see him in November 1935; that Robert Jenkins came in with a W.P.A. card, as a laborer, to go to work; that he saw Jenkins sign the paper when he came on the job; that he said he had come from a doctor and that he had a pain in his side; that he didn't know whether he could spade and that he had never done any spading; that he,(Neal) took him out and showed him how to do it; that Jenkins was a good man; that he was on the job until it was finished.

The evidence is overwhelmingly in favor of the defendant in that the plaintiff was not "Totally and permanently disabled by bodily injury or disease, and will thereby be permanently and continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value," as provided in the policy of insurance. The burden of proof to show that he was so incapacitated, rested upon the plaintiff, and he failed in this proof.

The case was tried upon the theory that before the plaintiff would be entitled to recover, he must prove by a preponderance of the evidence that before attaining the age of sixty years, he, the plaintiff, became disabled to such an extent as to be continuously prevented for life from engaging in any occupation for compensation of financial value, or performing any work for compensation of financial value. The Court, by instruction, so advised the jury. This Court, in the case of Sibley vs. Travelers' Insurance Company 275 Ill. App. 323, and in Buffo vs. Metropolitan Life Insurance Company 277, Ill. App. 366, construed the ~~insrau~~ insurance policies nearly identical as the one in the present suit, and stated the law to be the same as the Court instructed the jury in this case.

While the evidence in this case preponderates in favor of the defendant that the plaintiff was not totally and permanently disabled by bodily injury or disease and will thereby presumptably be continuously prevented for life from engaging in any occupation,

he drew a check every two weeks from November 1935, until January 16, 1937.

Charles H. Neal testified that he was Operator of the North Chicago Water Works; that he is acquainted with Robert Jenkins, the plaintiff, and had occasion to see him in November 1935; that Robert Jenkins came in with a N.Y.A. card, as a laborer, to go to work; that he saw Jenkins sign the paper when he came on the job; that he said he had come from a doctor and that he had a pain in his side; that he didn't know whether he could spade and that he had never done any spading; that he,(Neal) took him out and showed him how to do it; that Jenkins was a good man; that he was on the job until it was finished.

The evidence is overwhelmingly in favor of the defendant in that the plaintiff was not "totally and permanently disabled by bodily injury or disease, and will thereby be permanently and continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value," as provided in the policy of insurance. The burden of proof to show that he was so incapacitated, rested upon the plaintiff, and he failed in this proof.

The case was tried upon the theory that before the plaintiff would be entitled to recover, he must prove by a preponderance of the evidence that before attaining the age of sixty years, he, the plaintiff, became disabled to such an extent as to be continuously prevented for life from engaging in any occupation for compensation of financial value, or performing any work for compensation of financial value. The Court, by instruction, so advised the jury. This Court, in the case of Sibley vs. Travelers' Insurance Company 275 Ill. App. 323, and in Burto vs. Metropolitan Life Insurance Company 277, Ill. App. 304, considered the same insurance policy exactly identical as the one in the present suit, and stated the law to be the same as the Court instructed the jury in this case.

While the evidence in this case preponderates in favor of the defendant that the plaintiff was not totally and permanently disabled by bodily injury or disease and will thereby presumptably be continuously prevented for life from engaging in any occupation.

or performing any work for compensation of financial value, the trial court, for this reason alone, should not render a judgment in favor of the defendant notwithstanding the verdict in favor of the plaintiff.

The plaintiff alleges in his complaint that he complied with all of the terms of the insurance contract. One of the provisions of the contract of insurance is that the plaintiff shall give the defendant notice of his disability before the expiration of one year from the date of its commencement. The appellant contends that such notice was given by him to the defendant company. The proof, if any, of such notice is the testimony of the plaintiff himself, in which he states that, "He wrote the company a letter," that by Company he means, "The Equitable Life Insurance Company," and in an answer to a question from his attorney, "and did you address it to the address shown on the back of this policy?" He answered, "I did." This is the only evidence tending to show that the appellant did give the defendant notice of his disability. There is no statement at all to show that this letter was ever stamped, or mailed. In the case of Wilson vs. Ford 190 Ill. at Page 614, our Supreme Court, in discussing what proof is necessary to make prima facie case of notice, uses this language: "The depositing in the Post Office of a letter properly addressed with postage prepaid is prima facie evidence that the person, to whom it was addressed received it. In Equitable Life Insurance Society vs. Fromhold 75 App. 43, it was said: the placing in the mail of an envelope properly stamped is not even presumptive evidence of the delivery of the same unless it was properly addressed."

In the case of Jacobs vs. National Accident and Health Insurance Company, 151 Atlantic Page 565, the Supreme Court of Vermont, in discussing the sufficiency of a notice in a suit on an accident insurance policy, uses this language: "There is no evidence in the record that this notice was given. The only letter that can possibly be relied upon on the part of the plaintiff in this connection, is the one written by Mrs. Huntington a few days after the

to performing any work for compensation of financial value, the legal court, for this reason alone, should not render a judgment in favor of the defendant notwithstanding the verdict in favor of the plaintiff.

The plaintiff alleges in his complaint that he complied with all of the terms of the insurance contract. One of the provisions of the contract of insurance is that the plaintiff shall give the defendant notice of his disability before the expiration of one year from the date of its commencement. The appellant contends that such notice was given by him to the defendant company. The proof, if any, of such notice is the testimony of the plaintiff himself, in which he states that, "He wrote the company a letter," that by Company he means, "The Equitable Life Insurance Company," and in an answer to a question from his attorney, "and did you address it to the address shown on the back of this policy?" He answered, "I did." This is the only evidence tending to show that the appellant did give the defendant notice of his disability. There is not a statement or all to show that this letter was ever stamped, or mailed. In the case of Wilson vs. Ford 190 III. at Page 614, our Supreme Court, in discussing what proof is necessary to make prima facie case of notice, uses this language: "The depositing in the Post Office of a letter properly addressed with postage prepaid is prima facie evidence that the person, to whom it was addressed received it. In Equitable Life Insurance Society vs. Trumbold 75 Ind. 47, it was held, the placing in the mail of an envelope properly stamped is not even presumptive evidence of the delivery of the same unless it was properly addressed."

In the case of Jacobs vs. National Accident and Health Insurance Company, 121 Atlantic Page 507, the Supreme Court of Vermont, in discussing the sufficiency of a notice in a mail an accident insurance policy, uses this language: "There is no evidence in the record that this notice was given. The only letter that can possibly be relied upon on the part of the plaintiff as this notification, is the one written by Mr. Hastings a few days after the

accident. In regard to this letter of Mrs. Huntington's, there is no evidence, express or presumptive that it ever reached the defendant's agent. All that appears is that such a letter was written. It is not show that it ever found its way into the mails. It is to be remembered that it is the mailing of a letter that raises the so-called presumption that it was received by the addressee."

The evidence in this case does not raise any presumption that the letter written by the plaintiff was ever received by the defendant, and therefore the proof that such notice was given wholly fails. One of the necessary elements of the plaintiff's case is lacking, therefore, the trial court properly rendered judgment in favor of the defendant notwithstanding the verdict. The judgment of the trial court is hereby affirmed.

Affirmed.

accident. In regard to this letter of Mrs. Huntington's, there is no evidence, express or presumptive that it ever reached the defendant's agent. All that appears is that such a letter was written. It is not even that it ever found its way into the mails. It is to be remembered that it is the mailing of a letter that raises the so-called presumption that it was received by the addressee."

The evidence in this case does not raise any presumption that the letter written by the plaintiff was ever received by the defendant, and therefore the proof that such notice was given wholly fails. One of the necessary elements of the plaintiff's case is lacking, therefore, the trial court properly rendered judgment in favor of the defendant notwithstanding the verdict. The judgment of the trial court is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

5

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 16 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9482 Ag. No. 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1939.

JULIA MARTOCCIO, Plaintiff (Appellant), vs. THOMAS D. ORGO, ANNA ORGO, LOUIS SCHIAVONE, DR. JOSEPH M. SCHIAVONE and DUPAGE LIQUOR STORE, INC., a corporation, Defendants (Appellees.	Appeal from Circuit Court, DuPage County.

WOLFE, P. J.

The plaintiff, Julia Martoccio, started a suit in the Circuit Court of DuPage County, against the defendants, Thomas D. Orgo, et al. The complaint was amended several times and finally went to trial upon the third amended and supplemental complaint and the answer of the defendants thereto. In her suit, the plaintiff seeks the rescission of a salary contract of Thomas D. Orgo, the Manager of the DuPage Liquor Stores, Inc., and the cancellation of certain shares of stock, which she charges were fraudulently issued. The plaintiff prays for a restraining order to prevent said Thomas D. Orgo from drawing funds from the corporation and from assigning, or transferring any of the stock of the corporation, and that the said Orgo be ordered to repay to the company, certain funds that it is alleged he fraudulently had withdrawn for salary as manager of the same. She charges that the resolution of the Board of Directors, in fixing Orgo's salary, was illegally passed,

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1939.

JULIA BATTOCCIO, Plaintiff	
vs.	
THOMAS D. ORGO, AMOS ORGO, LOUIS ANSTAVONS, DR. THOMAS D. SCHIFFMAN and THEATRE LIQUOR SHOPS, INC., a corporation, Defendants (Appellees.	Appeal from Circuit Court of Du Page County.

MR. P. J.

The plaintiff, Julia Battoccio, started a suit in the Circuit Court of DuPage County, against the defendants, Thomas D. Orgo, et al. The complaint was amended several times and finally went to trial upon the third amended and supplemental complaint and the answer of the defendants thereto. In her suit, the plaintiff seeks the rescission of a salary contract of Thomas D. Orgo, the manager of the DuPage Liquor Stores, Inc., and the cancellation of certain shares of stock, which the charges were fraudulently issued. The plaintiff prays for a restraining order to prevent said Thomas D. Orgo from drawing funds from the corporation and from assigning, or transferring any of the stock of the corporation, and that the said Orgo be ordered to repay to the company, certain funds that it is alleged he fraudulently had attributed as salary as manager of the same. She charges that the resolution of the Board of Directors, in fixing Orgo's salary, was illegally passed,

since it required the vote of Orgo himself to pass such resolution. The bill prays for general relief.

The cause was referred to the Master in Chancery several times to take proof and make his report of finding of facts and conclusions of law. Evidence was heard and the Master made his findings to which the plaintiff filed objections. The same were overruled and allowed to stand as exceptions before the Court. The Court overruled the exceptions to the Master's Report and dismissed the plaintiff's bill for want of equity. It is from this order that the appeal is prosecuted to this court.

The record does not include the finding of the Master in Chancery which was approved by the Court, and which appellant now seeks to have this court reverse. The appellees, in their printed brief, claim that the Master's Report should have been included in the record, and the appellant has failed to so include it; that it is incumbent upon the appellant to see that a complete record is presented to this court, and that we cannot now pass upon the questions of fact that were presented to the trial court. The appellant made a motion for leave to file the Master's Report, and supported her motionby affidavits charging that it was agreed with the attorney for the appellees, that the Master's Report need not be included in the record in this case. The attorney for the appellees filed an affidavit denying that there was any such agreement.

The Master's Report should have been included in the record in this case. We denied the motion of the appellant to file the Master's Report at the time it was presented. We do not care to be put in a position where we will have to pass upon the integrity of the attorneys in the litigation. One or the other is mistaken, as to what was agreed upon in regard to the Master's Report not being included in the record. Why it should have been omitted when a large proportion of the

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appellant's assignment of errors is based upon the Master's Report, is difficult for this court to understand.

We have decided to pass upon the merits of the case, so have read the evidence as abstracted. The Master, in his report, evidently found that the plaintiff had failed to prove the material allegations of her amended and supplemental complaints. This is gathered from the record, as it shows the plaintiff filed objections to the Master's Report, which were overruled. Upon a review of the evidence as presented under the exceptions to the Master's Report, the Court has found that the plaintiff has failed in her proof to sustain the material allegations of her complaint, ~~whi~~ since he overruled the exceptions and dismissed the bill for want of equity. From the reading of the evidence, it is our conclusion that the court properly found that the proof did not sustain the allegations of the amended and supplemental complaints.

The first point argued by the appellant is, "A resolution by which a salary or compensation was voted to an officer of the corporation is illegal if it is carried by his vote, and it is equally illegal if it is procurred by his influence, although enough directors voted for it to carry it without counting him." Paragraph 12 of the supplemental complaint is as follows: "Plaintiff further alleges that the records of said corporation further show that on the 15th day of April 1936, pursuant to a waiver of notice, a special meeting of the board of directors of said corporation was held, at which the following resolution was introduced and passed, all of the directors voting therefor: Resolved that the company employ Thomas D. Orgo as manager of the corporation at a salary of $90.00 per week for a period of one year from this date." This is the resolution that the plaintiff claims was illegal and void, because Thomas D. Orgo as an

appellant's assignment of errors is based upon the Master's Report, is difficult for this court to understand.

We have decided to pass upon the merits of the case, so have read the evidence as abstracted. The Master, in his report, evidently found that the plaintiff had failed to prove the material allegations of her amended and supplemental complaints. This is gathered from the record, as it shows the plaintiff filed objections to the Master's Report, which were overruled. Upon a review of the evidence as presented under the exceptions to the Master's Report, the Court has found that the plaintiff has failed in her proof to sustain the material allegations of her complaint, and since he overruled the exceptions and dismissed the bill for want of equity. From the reading of the evidence, it is our conclusion that the court properly found that the proof did not sustain the allegations of the amended and supplemental complaints.

The first point argued by the appellant is, "A resolution whereby a salary or compensation was voted to an officer of the corporation is illegal if it is carried by his vote, and it is equally illegal if it is procured by his influence, although enough directors voted for it to carry it without counting him." Paragraph 12 of the supplemental complaint is as follows: "Plaintiff further alleges that the records of said corporation further show that on the 15th day of April 1926, pursuant to a waiver of notice, a special meeting of the board of directors of said corporation was held, at which the following resolution was introduced and passed, all of the directors voting thereto: Resolved that the company employ Thomas D. Orpo as manager of the corporation at a salary of $25.00 per week for a period of one year from this date." This is the resolution that the plaintiff claims was illegal and void, because Thomas D. Orpo as

officer of the company, voted for it. It will be observed that this resolution does not fix a salary for an officer of a corporation, but fixes a salary of the manager of it. Our courts have often reqognized the difference between a salary of an officer of a corporation and an employee, or officer, who renders special services for the corporation. The law is clearly stated in the case of Joy vs. Ditto 356 Ill. Page 348, where our Supreme Court uses this language: "It is the rule in this State, and generally, that a director of a corporation, as such, is not entitled to receive a salary unless the same is previously authorized by by-laws or by resolution of the board of directors. Payment of a salary greater than that so authorized is voidable at the suit of a stockholder not participating therein. (Brown v. De-Young, 167 Ill. 549; Ellis v. Ward, 137 id. 509; Bloom v. Vehon Co. 341 id. 200; Gudin v. Cement Co. 79 W. Va. 83.) It will be observed that this rule, as well as the West Virginia statute, relates to salaries paid to officers or directors "as such," and in this case, if the services rendered for which compensation here was paid were not services required of them as officers or directors but were services rendered as employees of the corporation, then complainants may not recover simply because the amount of compensation was not fixed by the board of directors, since under such circumstances the defendants were not acting in an official capacity. That an officer or a director of a corporation may also validly contract with the corporation to serve it as an employee and be paid for that service is no longer an open question in this State. The rule that an officer or a director of a corporation cannot receive compensation unless such is provided by the by-laws or resolution of the board of directors before the services are rendered has an exception now as fully established as the rule (4 Fletcher's Ency.

officer of the company, voted for it. It will be observed that this resolution does not fix a salary for an officer of a corporation, but fixes a salary of the manager of it. Our courts have often recognized the difference between a salary of an officer of a corporation and an employee, or officer, who renders special services for the corporation. The law is clearly stated in the case of Joy vs. Ditto 39 Ill. Page 346, where our Supreme Court uses this language: "It is the rule in this state, and generally, that a director of a corporation, as such, is not entitled to receive a salary unless the same is previously authorized by by-laws or by resolution of the board of directors. Payment of a salary greater than that so authorized is voidable at the suit of a stockholder not participating therein. (Brown v. De-Young, 167 Ill. 549; Ellis v. Ward, 137 id. 207; Wilson v. Vohon Co. 141 id. 200; Gwin v. Gomert Co. 79 W. Va. 83.) It will be observed that this rule, as well as the West Virginia statute, relates to salaries paid to officers or directors "as such," and in this case, if the services rendered for which compensation more was paid were not services required of them as officers or directors but were services rendered as employees of the corporation, then complainants may not recover simply because the amount of compensation was not fixed by the board of directors, since under such circumstances the defendants were not acting in an official capacity. That an officer or a director of a corporation may also validly contract with the corporation to serve it as an employee and be paid for that service is no longer an open question in this state. The rule that an officer or a director of a corporation cannot receive compensation unless such is provided by the by-laws or resolution of the board of directors before the services are rendered has an exception now as fully established as the rule (4 Fletcher's Cyc.

"Corporations," sec. 2739,) that where such officer or director has performed services clearly outside the scope of his duties as such officer or director, at the instance of someone of the corporation having general authority over its affairs and under a promise of payment for such services, he is entitled to receive pay therefor." This case is decisive of the question of whether the board could, by resolution, fix a salary of Orgo as manager of the defendant company. We find no merit in the contention that the resolution fixing the salary of the manager of the company is void.

Later in the complaint, it is charged, "Plaintiff further represents that while the records of the corporation show that the meeting at which the contract was entered into by the Board of Directors with Thomas D. Orgo for a salary of ninety dollars ($90.00) per week was held on the 15th day of April, A.D. 1936, that she believes that the meeting was actually held at a later date, in an attempt by said Thomas D. Orgo to take money from the corporation to which he was not entitled; that even though the meeting above mentioned was held at the time stated in said minutes, the agreement is illegal and void and contrary to law; that said contract was unconscionable and contrary to the best interests of the corporation, and should be declared null and void." There is no proof in the record to sustain this charge.

The record shows that after the company was first organized, only part of the stock was issued, and that later the stockholders were issued additional stock. The plaintiff insists that this was illegal and void, because she was a stockholder and was entitled to participate in the subscription, or purchase of new stock in proportion to the number of shares of the original stock held by her, and

"Corporations," sec. 2727,) that where such officer or director has performed services clearly outside the scope of his duties as such officer or director, at the instance of someone of the corporation having general ownership over its affairs and under a promise of payment for such services, he is entitled to receive pay therefor." This case is decisive of the question of whether the board could, by resolution, fix a salary of Orge as manager of the defendant company. We find no merit in the contention that the resolution fixing the salary of the manager of the company is void.

Later in the complaint, it is charged, "Plaintiff further represents that while the records of the corporation show that the meeting at which the contract was entered into by the Board of directors with Thomas D. Orge for a salary of [illegible] per week was held on the 15th day of April, A.D. 1936, that she believes that the meeting was actually held at a later date, in an attempt by said Thomas D. Orge to take money from the corporation to which he was not entitled; that even though the meeting above mentioned was held at the time stated in said minutes, the agreement is illegal and void and contrary to law; that said contract was unconscionable and contrary to the best interests of the corporation, and should be declared null and void." There is no proof in the record to sustain this charge.

The record shows that after the company was first organized, only part of the stock was issued, and that later the stockholders were issued additional stock. The plaintiff insists that this was illegal and void, because she was a stockholder and was entitled to participate in the subscription, or purchase of new stock in proportion to the number of shares of the original stock held by her, and

that the other stockholders could not deprive her of this right. It is insisted by the appellees that the appellant has no right to complain, because at the time of the issuance of the additional shares of capital stock, she was not a stockholder of redord of the corporation. There is a dispute as to the time and the manner in which the plaintiff acquired her stock. The record shows that she was not a stockholder at the time of the issuance of the stock, therefore she had no legal right to subscribe for additional shares of the capital stock of the corporation.

The appellant also contends that any salary increase by resolution of directors, or increase of their own salaries must be reasonable, and that the increase of the salary of Orgo from $90.00 to $100.00 per week was unreasonable. There is no evidence in the record to sustain this charge. The capital stock of this company was small, but the record does not show what the volume of business of this corporation was, or the profits from the same. We find no merit in this contention. It is claimed that the defendants entered into a fraudulent scheme to deprive the plaintiff of her rights as a stockholder in said corporation. Evidence of fraud must always be proven by a clear and convincing evidence. Schiavone vs. Ashton 332 Ill. 484; Dombro vs. Hugo 370 Ill. 381. The proof in this case falls short of being clear and convincing that the defendants entered into a fraudulent scheme to deprive the plaintiff of her rights.

The trial court properly dismissed the bill for want of equity. The decree of the trial court will be affirmed.

Affirmed.

that the other stockholders could not deprive her of this right. It is insisted by the appellees that the appellant has no right to complain, because at the time of the issuance of the additional shares of capital stock, she was not a stockholder of record of the corporation. There is a dispute as to the time and the manner in which the plaintiff acquired her stock. The record shows that she was not a stockholder at the time of the issuance of the stock, therefore she had no legal right to subscribe for additional shares of the capital stock of the corporation.

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The trial court properly dismissed the bill for want of equity. The decree of the trial court will be affirmed.

AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9512

34

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

304 I.A. 634 2

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9513 AGENDA NO. 9

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1940.

PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error, v. WAYNE HARSHBARGER, Plaintiff in Error.	WRIT OF ERROR TO THE CIRCUIT COURT OF KNOX COUNTY.

DOVE, J.

The defendant, Wayne Harshbarger, highway commissioner of the Town of Galesburg in Knox County, on February 14, 1939, during the February Term of the Circuit Court of that county, entered a plea of guilty to the first count of an indictment, which count purported to charge him with malfeasance in office. The court accepted his plea of guilty and on that day imposed a fine of $750.00 and costs. On the same day he made a motion to reduce the fine and this motion was taken under advisement by the court. Subsequently and on September 15, 1939, which was during the June Term of said court, the defendant was present in court and an order was entered sustaining his motion to reduce his fine and the amount of the fine was reduced to $500.00. At the same time the court ordered the defendant committed to the county jail of Knox County, there to work out the fine of $500.00 and costs at the rate of $1.50 per day until said fine and costs were fully satisfied and discharged. At that time a motion in

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1940.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. WAYNE HARSHBARGER, Plaintiff in Error.	Writ of Error to the Circuit Court of Wayne County.

Mr. J.

The defendant, Wayne Harshberger, highway commissioner of the Town of Galesburg in Knox County, on February 14, 1939, during the February Term of the Circuit Court of that county, entered a plea of guilty to the first count of an indictment, which count purported to charge him with malfeasance in office. The court accepted his plea of guilty and on that day imposed a fine of $100.00 and costs. On the same day he made a motion to reduce the fine and this motion was taken under advisement by the court. Subsequently and on September 15, 1939, which was during the June Term of said court, the defendant was present in court and an order was entered sustaining his motion to reduce his fine and the amount of the fine was reduced to $300.00. At the same time the court ordered the defendant committed to the county jail of Knox County, there to work out the fine of $300.00 and costs at the rate of $1.50 per day until said fine and costs were fully satisfied and discharged. At that time a motion in

arrest of judgment was overruled and also a motion to suspend the issuance of a mittimus in order that defendant could apply to this court for a supersedeas was denied and defendant was placed in custody.

It appears from the record that before entering his plea of guilty, defendant filed his written motion to quash the indictment and that a hearing was had thereon and the motion to quash was denied. Both the motion to quash the indictment and the motion in arrest of judgment assigned as a ground therefor that the indictment fails to charge any crime amounting to malfeasance in office. The law is that a defendant charged in an indictment with a crime cannot be lawfully convicted on his plea of guilty to a crime not charged in the indictment. The People v. Brown, 312 Ill. 63; Klawanski v. The People, 218 Ill. 481; The People v. Sword, 370 Ill. 140; The People v. Green, 368 Ill. 242.

The count of the indictment before us charges that the defendant, "Then and there being and ever since then continuously remaining to be the duly elected, qualified, commissioned and acting highway commissioner under the laws of the State of Illinois * * * then and there did purchase for his individual private and personal use, gain and profit two (2) motor vehicle tires and two (2) inner tubes from Goodyear Service, * * * and as such highway commissioner did then and there unlawfully, feloniously and fraudulently direct that the said motor vehicle tires and inner tubes be charged to said Galesburg Township * * * and that the account of the said Galesburg Township with said Goodyear Service * * * be debited with the purchase price of said motor vehicle tires and inner tubes". The indictment concludes: "and the said Wayne Harshbarger was then and there guilty of willful and corrupt malfeasance in public office, contrary," etc.

arrest of judgment was overruled and also a motion to suspend the issuance of a mittimus in order that defendant could apply to this court for a supersedeas was denied and defendant was placed in custody.

It appears from the record that before entering his plea of guilty, defendant filed his written motion to quash the indictment and that a hearing was had thereon and the motion to quash was denied. Both the motion to quash the indictment and the motion in arrest of judgment rested on a ground therefor that the indictment fails to charge any crime amounting to malfeasance in office. The law is that a defendant charged in an indictment with a crime cannot be lawfully convicted on his plea of guilty to a crime not charged in the indictment. The People v. Brown, 312 Ill. 63; Blewanski v. The People, 87 Ill. 317; The People v. Moore, 177 Ill. 100; The People v. Green, 148 Ill. 112.

The count of the indictment before us charges that the defendant, from and then being and ever since then continuously remaining in the duly elected, qualified, commissioned and acting highway commissioner under the laws of the State of Illinois * * * then and there did purchase for his individual private and personal use, gain and benefit two (2) motor vehicle tires and two (2) inner tubes from Goodyear Service, * * * and as such highway commissioner did then and there wilfully, feloniously and fraudulently direct that the said motor vehicle tires and inner tubes be charged to said Galesburg Township * * * and that the account of the said Galesburg Township with said Goodyear Service * * * be debited with the purchase price of said motor vehicle tires and inner tubes". The indictment concluded "and the said Wayne Hershberger was then and there guilty of wilful and corrupt malfeasance in public office, contrary," etc.

This concluding portion of this count of the indictment quoted above is a conclusion of law and adds nothing to the previous averments therein contained. The People v. Munday, 293 Ill. 191. The question then arises whether the facts stated in the preceding part of this count charges a criminal offense.

Counsel for the People state that this indictment is based on Sec. 449 of Chap. 38, Ill. Rev. Stat. 1939 which provides that every person holding any public office, whether state, county or municipal, trust or employment who shall be guilty of palpable omission of duty, or who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated, or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly for the expenditure of a greater sum or amount of money than may have been at the time of making the contracts appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject matter of the contracts, or who shall be guilty of willful and corrupt oppression, malfeasance or partiality where no special provisions shall have been made for the punishment thereof, shall be fined not exceeding $10,000.00 and may be removed from his office, trust or employment.

A similar statute in regard to omission and misconduct of public officers has been in force in this State for many years. In the early case of Jones v. The People, 3 Ill. 477, it appeared that an indictment had been returned by the grand jury of Jackson County, averring that Andrew Jones was a Justice of the Peace of that county, and had issued a warrant for the arrest of John King on the charge of perjury. The indictment charged that Jones, as Justice of the Peace, refused to issue subpoenas on behalf of King but immediately upon

being brought before him forced him into trial and required him to enter into a recognizance for his appearance at the May Term of the Circuit Court of Jackson County. The indictment then averred that in so refusing to issue subpoenas at the request of King, Jones was guilty of malfeasance in office contrary to the form of the statute. In reversing the conviction of the defendant, the court said: "This indictment is found under a statute of this state. The indictment attempted to charge Andrew Jones with malfeasance in office. To make this indictment good, it ought to have been charged that the defendant 'wilfully and corruptly refused to issue subpoenas". The offence is not set out in the indictment in the terms of the statute, nor in such a way as it can be understood".

Wickersham v. The People, 2 Ill. 127 (*128) was an indictment against James L. Wickersham for malfeasance in office as a Justice of the peace. The indictment averred that the defendant, as justice, took up estray animals, specifying the number and kind and charged that he corruptly caused them to be appraised before himself as such justice. It was contended that the indictment did not charge an offense, but the court said that the indictment charged the defendant with having done certain things corruptly and continued, "Whether the acts were done ignorantly, or for corrupt purposes would necessarily depend on the evidence exhibited on the trial but that such acts would, in a case where the justice was a party interested, be illegal, we cannot doubt; and that they would, if done with a corrupt intent, be an act of malfeasance in office, seems equally certain."

Counsel for defendant in error cite and rely upon the case of The People v. Begley, 270 Ill. App. 197. In that case the indictment was based on the same section of the statute upon which the instant indictment is based and charged that the defendant, as a police officer,

being brought before him forced him into trial and required him to enter into a recognizance for his appearance at the May Term of the Circuit Court of Lamar County. The indictment then stated that in so refusing to issue subpoenas at the request of King, Jones was guilty of malfeasance in office contrary to the form of the statute. In reversing the conviction of the defendant, the court noted: "This indictment is found under a statute of this state. The indictment attempted to charge Judge Jones with malfeasance in office. To make this indictment good, it ought to have been charged that the defendant 'willfully and corruptly refused to issue subpoenas'. The offense is not set out in the indictment in the terms of the statute, nor in such a way as it can be understood".

Interesting v. The People, 1 Ill. 167 (1827) was an indictment against James L. Interesting for malfeasance in office as a justice of the peace. The indictment charged that the defendant, in pretend, took up estray animals, specifying the number and kind and charged that he "corruptly caused them to be appraised never intent to be a justice. It was contended that the indictment did not charge an offense, but the court said that the indictment charged the defendant with having done certain things corruptly and continued, "Whether the acts have been illegally, or for improper purposes could necessarily depend on the evidence exhibited on the trial but that such acts may, in a case where the justice was a party interested, be illegal, we cannot doubt; and that they would, if done with a corrupt intent, be an act of malfeasance in office, seems equally certain."

Counsel for defendant in error site and rely upon the case of The People v. Hedley, 2 Ill. App. 197. In that case the indictment was based on the same section of the statute upon which the instant indictment is based and charged that the defendant, as a police officer,

"did willfully, wickedly, unlawfully, corruptly and oppressively and by means of threats to arrest one Gene Hasewer and by intimidating and putting in fear the said Gene Hasewer willfully, corruptly, oppressively, wickedly and without any legal right to do so, demand and willfully, corruptly and wickedly receive from him, the said Gene Hasewer, a large sum of money". In the course of its opinion the court said: "It is said that the statute in question contains no description or definition of the offense and leaves it to the pleader to state facts upon which the court in its discretion shall determine whether the facts alleged come within its provisions. An indictment or information is sufficient which states the offense in the terms and language of the statute creating it, but where the statute itself does not define the nature of the offense sufficiently to notify the defendant of the crime with which he is charged, then the allegation in the words of the statute is insufficient. Gallagher v. People, 211 Ill. 158. Granting that the statute in question defines the crime in general terms, namely, as 'willful and corrupt oppression, malfeasance or partiality' on the part of a police officer, the facts set forth in the indictment clearly come within this description. The indictment in substance charges that the defendant, as a police officer, unlawfully and by means of threats to arrest, and by thus intimidating Hasewer, demanded and received from him without any legal right to do so, the sum of $1,000."

A highway commissioner in this state has the power and duty to have and take possession of and keep under shelter township highway equipment such as scrapers, plows and other tools including tractors, graders and trucks, and has the power to direct the expenditure of all monies collected for township road purposes. Ill. Rev. St. Chap. 121, Sec. 56. We agree with the language of the Wickersham case that if the acts alleged in the indictment were done with a corrupt intent

"did willfully, wickedly, unlawfully, corruptly and oppressively and by means of threats to arrest one Gene Hanover and by intimidating and putting in fear the said Gene Hanover willfully, corruptly, oppressively, wickedly and without any legal right to do so, demand and willfully, corruptly and wickedly receive from him, the said Gene Hanover, a large sum of money". In the course of its opinion the court said: "It is said that the statute in question contains no description or definition of the offense and leaves it to the plaintiff to state facts upon which the court in its discretion shall determine whether the facts alleged come within its provisions. An indictment or information is sufficient which states the offense in the terms and language of the statute creating it, but where the statute itself does not define the nature of the offense sufficiently to notify the defendant of the crime with which he is charged, then the allegation in the words of the statute is insufficient. Gallagher v. People, 221 Ill. 152. Treating that the statute in question defines the crime in general terms, namely, as 'willful and corrupt oppression, mistreatment or partiality' on the part of a police officer, the facts set forth in the indictment clearly come within this description. The indictment in substance charges that the defendant, as a police officer, unlawfully and by means of threats to arrest, and by thus intimidating Hanover, demanded and received from him without any legal right to do so, the sum of $1,000."

A highway commissioner in this state has the power and duty to have and take possession of and keep under similar township highway equipment such as scrapers, plows and other tools including trestles, grades and trucks, and has the power to direct the expenditure of all monies collected for township road purposes. Ill. Rev. St. Chap. 121, Sec. 56. We agree with the language of the Wisdersham case that if the acts alleged in the indictment were done with a corrupt intent

there would be an act of malfeasance in office. In the absence of that allegation or an equivalent one, this count of the indictment, in our opinion, does not charge an offense. In the Begley case, supra, the indictment contained these necessary allegations, The allegation here is that the defendant purchased motor vehicle tires and tubes from Goodyear Service for his individual private and personal use, gain and profit, and did then and there direct that the said tires and tubes be charged to the township and the township account be debited with the purchase price thereof. In our opinion the offense charged is getting property from Goodyear Service for his own use and charging it to the town. In order to constitute this an act of malfeasance in office, the indictment should have charged that these acts were done with a wicked, corrupt and unlawful intent and purpose.

The record discloses that the indictment returned by the grand jury in the instant case consisted of nineteen counts, that defendant was furnished with a copy thereof, a list of witnesses and jurors, that he entered a plea of guilty to the first count and no disposition appears to have been made of the remaining eighteen counts. When the court accepted his plea of guilty to the first count, he imposed a fine of $750.00 and costs. That was the complete judgment of the court and an execution could have been issued thereon. After the judgment was rendered but on the same day the defendant made an oral motion to reduce the fine and that motion was taken under advisement. At the next term of court the defendant's motion was sustained and the fine reduced to $500.00. In addition, however, the court ordered the defendant committed to the county jail and directed that he should work out the fine and costs at the rate of $1.50 per day. Whether the court had jurisdiction to do anything other than sustain or deny defendant's motion need not be determined inasmuch as we have arrived at the conclusion that the court erred in not sustaining the motion in arrest of judgment as to the first count of this indictment and

for that error the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO.9522 AGENDA NO. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1940.

TAMPICO FARMERS ELEVATOR COMPANY, a Corporation, Appellant, v. WALNUT GRAIN COMPANY, a Corporation, et al, Appellees.	APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY

DOVE, J.

This was a suit brought by Tampico Farmers Elevator Company against Walnut Grain Company, Caroline Keeler and Nellie Breed to recover the value of corn alleged to have been the property of the plaintiff which the defendants converted to their own use. The trial resulted in a judgment in favor of the defendants which this court reversed and remanded the cause to the circuit court of Whiteside county with directions to that court "to enter judgment in favor of the plaintiff for the value of the corn less two-fifths thereof being deducted for landlord's lien, with interest thereon from the first of September, 1934 until the entry date of the judgment, against the defendants now appearing in the suit excepting the defendant, the Walnut Grain Company". Tampico Farmers Elevator Company v. Walnut Grain Company, 300 Ill. App. 614.

DOVE, J.

This was a suit brought by Douglas Farmers Elevator Company against Walnut Grain Company, Carolina Motor and Kelly Lyons to recover the value of corn alleged to have been the property of the plaintiff which the defendants converted to their own use. The trial resulted in a judgment in favor of the defendants which this court reversed and remanded the cause to the circuit court of Whitesides county with directions to that court "to enter judgment in favor of the plaintiff for the value of the corn less two-fifths thereof being tendered for Lundberg's lien, with interest thereon from the first of September, 1934 until the entry date of the judgment, against the defendants now appearing in the suit excepting the defendant, the Walnut Grain Company". Douglas Farmers Elevator Company v. Walnut Grain Company, 309 Ill. App. 414.

While the cause was pending in this court Nellie Breed died and her death was suggested and after the cause was re-docketed in the circuit court Ralph Y. Breed, administrator of her estate, was substituted as a party defendant and on motion of the plaintiff for judgment pursuant to the mandate of this court, the trial court rendered a judgment in favor of the plaintiff and against Caroline Keeler and Ralph Y. Breed, Administrator as aforesaid, for $579.84 and the plaintiff again brings the record to this court for review.

Appellant contends that the evidence upon the former hearing discloses that 2401 bushels of corn were involved in this litigation, that two-fifths thereof belonged to Caroline Keeler and Nellie Breed, that they sold all of it to the Walnut Grain Company for seventy cents per bushel and that therefore under the mandate of this court the trial court should have rendered judgment in favor of appellant for $1008.42, being three-fifths of 2401 bushels of corn at seventy cents per bushel, together with interest thereon at five per cent from September 1, 1934 to September 29, 1939 (the date the judgment was rendered), amounting to $256.30 or a total of $1264.72.

Appellees insist that the evidence upon the former hearing as shown by the former opinion of this court is that the Walnut Grain Company bought from Keeler and Breed 1101 bushels of corn, that the value thereof at seventy cents per bushel was $770.70, that two-fifths of that amount should be deducted leaving $462.42, upon which interest should be computed from September 1, 1934 to September 29th, 1939, amounting to $117.42 and that these two latter amounts aggregating $579.84 is the amount, according to the mandate of this court, for which appellant was entitled to judgment and it is the amount of the judgment from which appellant prosecutes this appeal.

The opinion in the former case discloses that appellant was a judgment creditor of Nels R. Rasmussen and had an execution issued

While the cause was pending in this court Nellie Streed died and her death was suggested and after the cause was re-docketed in the circuit court Ralph Y. Streed, administrator of her estate, was substituted as a party defendant and on motion of the plaintiff for judgment pursuant to the mandate of this court, the trial court rendered a judgment in favor of the plaintiff and against Cornelius Hosler and Ralph Y. Streed, Administrator as aforesaid, for $279.84 and the plaintiff again brought the record to this court for review.

Appellant contends that the evidence upon the former hearing discloses that 2401 bushels of corn were involved in this litigation, that two-fifths thereof belonged to Cornelius Hosler and Nellie Streed, that they only did at it in the action brought for partial taxes paid and that therefore under the mandate of this court the trial court should have rendered judgment in favor of appellant for $1008.42, being three-fifths of 2401 bushels of corn at seventy cents per bushel, together with interest thereon at five per cent from September 1, 1934 to September 27, 1939 (the date the judgment was rendered), amounting to $252.30 or a total of $1260.72.

Appellees insist that the evidence upon the former hearing as shown by the former opinion of this court in that the Walnut Grain Company bought from Hosler and Streed 1201 bushels of corn, that the value thereof at seventy cents per bushel was $840.70, that two-fifths of that amount should be deducted leaving $336.28, upon which interest should be computed from September 1, 1934 to September 27, 1939, amounting to $117.41, that there was no judgment against appellees for $279.84 in the amount, according to the mandate of this court, for which appellant was entitled to judgment and it is the amount of the judgment from which appellant prosecutes this appeal.

The opinion in the former case discloses that appellant was a judgment creditor of Hale K. Hammond and had by execution issued

upon its judgment which was returned by the sheriff bearing the following endorsement: "On this 21st day of December, 1933 by virtue of the within execution I have levied upon all right, title and interest of Nels P. Rasmussen and to the following property: one small safe, shot gun, twelve head of cows, etc., eight hundred bushels of corn and all his interest in the corn * * * ". In commenting upon this levy we stated that the endorsement did not state that the eight hundred bushels of corn was located in a crib nor give the location of the corn, that no change of possession followed the execution sale and therefore the Walnut Grain Company was a purchaser for value.

It also appears from the former opinion that the sale under this execution took place on March 12, 1934 on the Griffith farm where Nels R. Rasmussen lived and not on the McBride farm where the corn was cribbed, that following the execution sale the corn was not moved but continued to remain in the crib on the Griffith farm, apparently in the possession of Leonard G. Rasmussen until August 31, 1934, when it was hauled from the crib to the elevator of the Walnut Grain Company which had purchased the corn from Keeler and Breed. The opinion further discloses that on March 5, 1934 Leonard G. Rasmussen, Caroline Keeler and Nellie Breed, as tenant and landlords, signed applications for Farm Warehouse Certificates, which were issued to them and the corn in this crib sealed and the warehouse certificates were indorsed to the Commodity Credit Corporation as collateral security for their corn producers' note for $1080.00. The opinion further states that at this execution sale on March 12, 1934 appellant bought 1101 bushels of corn subject to the landlord's lien of two-fifths thereof and the record discloses that this is just what R. F. Nelson, appellant's manager, testified. He further testified that he did not know how this amount was arrived at but that the sheriff stated at the sale that there was that much corn over on the McBride place and that he (Nelson) purchased it for appellant for twenty-five cents per bushel which he testified was substantially market price,

upon the judgment which was returned by the sheriff bearing the following endorsement: "On this 21st day of December, 1933 by virtue of the within execution I have levied upon all right, title and interest of Nola P. Rasmussen and to the following property: one small safe, shot gun, twelve head of cows, etc., eight hundred bushels of corn and all his interest in the corn * * * ". In commenting upon this levy we stated that the endorsement did not state that the eight hundred bushels of corn was located in a crib nor give the location of the corn, that no change of possession followed the execution sale and therefore the Walnut Grain Company was a purchaser for value.

It also appears from the former opinion that the sale under this execution took place on March 12, 1934 on the Griffith farm where Nola M. Rasmussen lived and not on the McBride farm where the corn was cribbed, that following the execution sale the corn was not moved but continued to remain in the crib on the Griffith farm, apparently in the possession of Leonard G. Rasmussen until August 31, 1934, when it was hauled from the crib to the elevator of the Walnut Grain Company which had purchased the corn from Keeler and Creed. The opinion further discloses that on March 5, 1934 Leonard G. Rasmussen, Geraldine Keeler and Nellie Creed, as tenant and landlords, signed applications for Farm warehouse certificates, which were issued to them and the corn in this crib sealed and the warehouse certificates were delivered to the Commodity Credit Corporation as collateral security for their corn producers' note for $1030.00. The opinion further states that at this execution sale on March 12, 1934 appellant bought 1101 bushels of corn subject to the landlord's lien of two-fifths thereof and the record discloses that this is just what R. T. Nelson, appellant's manager, testified. He further testified that he did not know how much was arrived at but that the sheriff stated at the sale that there was that much corn over on the McBride place and that he (Nelson) purchased it for appellant for twenty-five cents per bushel which he testified was substantially market price.

taking into consideration the fact that the landlord's share had to be taken out and that the purchaser was obliged to deliver it. The return of the sheriff discloses that appellant purchased at the execution sale 1101 bushels of corn at twenty-five cents per bushel subject to landlord's and Government's liens, if any for $275.25.

Counsel for appellant insist that the rights of the parties were fixed by the actual amount of the corn that was in this crib and not by the erroneous estimate of the sheriff and counsel argue that the evidence upon the trial disclosed that on August 31, 1934, there was delivered to the Walnut Grain Company 2401 bushels and 24 pounds of corn and that three-fifths of this amount, or 1440 3/5 bushels were subject to sale under this execution and were actually sold. Our former opinion, however, does not so state. What it does say is that plaintiff (appellant here) bought 1101 bushels of corn, which was on the McBride farm, subject to the landlord's lien of two-fifths thereof, and that is not only what Mr. Nelson, the purchaser, testified he bought for appellant, but it is the amount the sheriff stated at the sale he was selling and is the amount the sheriff's return states he sold. What we held by our former opinion was that appellant was entitled to recover the value of the corn it purchased at this execution sale and the trial court in rendering judgment followed the mandate and the language of the former opinion.

Under the authorities the only question presented for our determination upon this appeal is whether the judgment appealed from was so entered. Belding v. Belding, 281 Ill. App. 351. We think it was. The judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

taking into consideration the fact that the landlord's share had to be taken out and that the purchaser was obliged to deliver it. The return of the sheriff discloses that appellant purchased at the execution sale 1101 bushels of corn at twenty-five cents per bushel subject to landlord's and Government's liens, if any for $277.25.

Counsel for appellant insist that the rights of the parties were fixed by the actual amount of the corn that was in this crib and not by the numerous estimate of the sheriff and counsel argue that the evidence upon the trial disclosed that on March 31, 1934, there was delivered to the Walnut Creek Company 2401 bushels and 24 pounds of corn and that three-fifths of this amount, or 1440 3/5 bushels were sufficient to satisfy this execution and were actually sold. Our former opinion, however, does not so state. What it does say is that plaintiff (appellant here) bought 1101 bushels of corn, which was on the McCrada farm, subject to the landlord's lien of two-fifths thereof, and that is not only what Mr. Wilson, the purchaser, testified he bought for appellant, but it is the amount the sheriff stated at the sale he was selling and is the amount the sheriff's return states he sold. What we said by our former opinion was that appellant was entitled to recover the value of the corn it purchased at this execution sale and the trial court, in rendering judgment, followed the mandate and the language of the former opinion.

Under the authorities the only question presented for our determination upon this appeal is whether the judgment appealed from was so entered. Belding v. Belding, 201 Ill. App. 321. We think it was. The judgment will therefore be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WEBTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9524 AGENDA NO. 26

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1940.

CLARENCE A. ANDER, in his own right and as next friend for Mary Louise Ander and Eleanor Lucille Ander, Appellees, vs. ISAAC W. GEORGE and WALTER YARLING, Appellants.	APPEAL FROM THE CIRCUIT COURT OF DeKALB COUNTY.

DOVE, J.

Clarence A. Ander, individually and as next friend for Mary Louise Ander and Eleanor Lucille Ander, his minor daughters, filed in the Circuit Court of DeKalb County on March 3, 1937 a complaint against Isaac W. George and Walter Yarling to recover damages in the sum of $25,000.00 for injuries to their persons and property and their means of support as provided in Sec. 135, Chap. 43 Ill. Rev. Stat. 1939, being the Dram Shop Act. The complaint consisted of three counts, two of which charged that the defendant Isaac W. George was the owner of certain described premises in the City of DeKalb, where intoxicating liquor was sold, that on March 5th, 1936 the defendants owned, operated and conducted a tavern and retail liquor store on said premises in the City of DeKalb and on that day the defendants sold and gave intoxicating liquor to one Harrison Crooke and thereby caused in whole or in part his intoxication and

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TERRENCE A. LAMBERT, Ind. and as next friend for Mary Louise Lambert and Eleanor Lucille Lambert, minor daughters,	
Appellees,	
vs.	
IRAME W. GEORGE and WALTER YARLING,	
Appellants.	

STYLE, 1.

Terrence A. Lambert, individually and as next friend for Mary Louise Lambert and Eleanor Lucille Lambert, his minor daughters, filed in the Circuit Court of DeKalb County on March 3, 1937 a complaint against Irame W. George and Walter Yarling to recover damages in the sum of $25,000.00 for injuries to their persons and property and their means of support as provided in Sec. 135, Chap. 43 Ill. Rev. Stat. 1939, being the Dram Shop Act. The complaint consisted of three counts, two of which charged that the defendant Irame W. George was the owner of certain described premises in the City of DeKalb, where intoxicating liquor was sold, that on March 3rd, 1937 the defendants owned, operated and conducted a tavern and retail liquor store on said premises in the City of DeKalb and on that day the defendants sold and gave intoxicating liquor to one Harrison Crooks and thereby caused in whole or in part his intoxication and

that while he was so intoxicated he shot and wounded Emma Ander, from the effects of which she died three days thereafter. It was alleged that the said Emma Ander was the wife of Clarence A. Ander, the plaintiff and the mother of the other plaintiffs Mary Louise Ander and Eleanor Lucille Ander. The third count charged that the defendants were each guilty of wanton, wilful and malicious conduct in so selling the said Harrison Crooke intoxicating liquor, which caused his intoxication and that by reason thereof the plaintiffs are entitled to recover exemplary damages in addition to the actual damages they sustained. Both defendants appeared and filed answers denying the several allegations of the several counts other than the charge that Isaac W. George was the owner of the premises.

Thereafter and on June 19th, 1939 the defendant Isaac W. George filed his motion for an order on the plaintiffs to join as parties defendant Fred L. McClean, Charles A. Noren, James R. McCabe and Ethel I. Bliss. This motion was supported by an affidavit of the defendant Isaac W. George and in it it is alleged that the said Harrison Crooke did, on March 5th, 1936, purchase alcholic liquor from the said Fred L. McClean and James C. McCabe, who conducted taverns in the City of DeKalb and that said sales were made by said McClean and McCabe to Crooke during the afternoon of March 5th, 1936 and immediately prior to the shooting of Emma Ander. The affidavit further stated that Charles A. Noren was the owner of the building occupied as a tavern by Fred L. McClean and that he had knowledge that the said McClean conducted a tavern therein and sold alcholic liquor and had such knowledge a long time prior to March 5th, 1936. That Ethel I. Bliss was, on March 5th, 1936, and for a long time prior thereto the owner of the building where James R.

that while he was so intoxicated he shot and wounded Emma Ander, from the effects of which she died three days thereafter. It was alleged that the said Emma Ander was the wife of Clarence A. Ander, the plaintiff and the mother of the other plaintiffs Mary Louise Ander and Eleanor Lucille Ander. The third count charged that the defendants were each guilty of wanton, willful and malicious conduct in so selling the said Harrison Crooks intoxicating liquor, which caused his intoxication and that by reason thereof the plaintiffs are entitled to recover exemplary damages in addition to the actual damages they sustained. Both defendants appeared and filed answers denying the several allegations of the several counts other than the charge that Isaac N. George was the owner of the premises.

Thereafter and on June 19th, 1939 the defendant Isaac N. George filed his motion for an order on the plaintiffs to join as parties defendant Fred L. McGlean, Charles A. Moren, James R. Hodabe and Ethel I. Miles. This motion was supported by an affidavit of the defendant Isaac N. George and in it it is alleged that the said Harrison Crooks did, on March 5th, 1936, purchase alcoholic liquor from the said Fred L. McGlean and James C. Hodabe, who conducted taverns in the City of Dekalb and that said sales were made by said McGlean and Hodabe to Crooks during the afternoon of March 5th, 1936 and immediately prior to the shooting of Emma Ander. The affidavit further stated that Charles A. Moren was the owner of the building occupied as a tavern by Fred L. McGlean and that he had knowledge that the said McGlean conducted a tavern therein and sold alcoholic liquor and had such knowledge a long time prior to March 5th, 1936. That Ethel I. Miles was, on March 5th, 1936, and for a long time prior thereto the owner of the building where James R.

McCabe conducted a tavern and she knowingly permitted him to conduct a tavern therein and knew that he sold alcholic liquor on her premises to persons applying for the same. ~~From the foregoing allegations affiant concluded in this affidavit~~ affiant then averred that the sales of alcholic liquor made by McCabe and McClean to Crooke related to the same subject matter or controversy as alleged in the complaint and ~~therefore~~ concluded that in order to effect ~~render~~ a complete determination of the subject matter or controversy in this suit that the said Fred L. McClean, Charles A. Noren, James R. McCabe and Ethel I. Bliss should be joined ~~with~~ and made co-defendants with the present defendants. The motion requested that the court enter an order directing that a summons issue for the additional defendants, requiring them to appear at the next regular return day and that they be required to answer the complaint and that the court enter a further order requiring the plaintiffs to amend their complaint, making these parties additional parties defendant. On July 13, 1939 the Circuit Court denied this motion and on September 11th, 1939 an amended motion setting forth practically the same facts was filed and a hearing was had and an order entered denying the same. From these orders the defendants Isaac W. George and Walter Yarling have appealed.

Counselfor appellants concede that under the former practice the trial court was without power or authority to enter an order requiring a plaintiff or plaintiffs to join additional defendants but insist that Section 148 and 149 of the present Civil Practice Act warranted such procedure. We have read counsel's brief and also the sections referred to and in our opinion they do not warrant

[illegible] brought a tenor not too dissimilar [illegible] to [illegible] a tenor [illegible] and [illegible] that is [illegible] [illegible] but prevention to persons applying for the same. [illegible] [illegible] allegations although contended in their affidavit [illegible] sales of alcoholic liquor made by McCabe and McGlean to [illegible] related to the same subject matter or controversy as alleged in the complaint and therefore concluded that in order to [illegible] a complete determination of the subject matter or controversy in this suit that the said Fred L. McGlean, Charles A. [illegible], James E. McCabe and Ethel I. Mize should be joined [illegible] and made co-defendants with the present defendants. The motion requested that the court enter an order directing that a summons issue for the additional defendants, requiring them to appear at the next regular term day and that they be required to answer the complaint and that the court enter a further order requiring the plaintiffs to amend their complaint, making these parties additional parties defendant. On July 13, 1933 the Circuit Court granted this motion and on September 11th, 1933 an amended motion setting forth practically the same facts was filed and a hearing was had and an order entered denying the same. From these orders the defendants James E. McCabe and Walter Ludling have appealed.

Counselor appellants contends that under the Torrens jurisdiction the trial court was without power or authority to enter an order requiring a plaintiff in a suit to file additional defendants but insist that Section 145 and 149 of the present Civil Practice Act warranted such procedure. We have read counsel's brief and also the sections referred to and in our opinion they do not warrant

any such construction as counsel for appellants insist should be adopted. Section 148 provides, among other things, that any person may be made a defendant, who either jointly, severally or in the alternative is alleged to have an interest in the controversy or in any part thereof or in the transaction or series of transactions out of which the same arose and Section 149 provides that where a complete determination of the controversy cannot be had without the presence of other parties, the court may direct them to be brought in and that where a person, not a party, has an interest or title which the judgment may effect, the court, on application, shall direct him to be made a party. Notwithstanding these provisions, we are clearly of the opinion that the plaintiffs, in the instant case, should have a right to control their own suit. This action is purely statutory which gives a right of action in favor of the members of the family who shall be injured in person, property or means of support against any person or persons responsible for such injury and provides that such persons so responsible shall be liable "severally or jointly" for all damages sustained. The present statute is substantially a re-enactment of the Dram Shop Act of 1874 except where the words "intoxicating liquors" appear in the former act the words "alcholic liquors" are used in the present act and under the former act it was held that a defendant was liable for damages occasioned by his gift or sale of intoxicating liquor whether the liquor so furnished caused the intoxication in whole or in part. It is a familiar law of torts that when one has received an actionable injury at the hands of two or more wrong doers, all, however, numerous, are severally liable to him for damages for such injury and a plaintiff has a right to sue them jointly or he may bring his action separately

any such construction as counsel for appellants insist should be adopted. Section 142 provides, among other things, that any person may be made a defendant, who either jointly, severally or in the alternative is alleged to have an interest in the controversy or in any part thereof or in the transaction or series of transactions out of which the same arose and Section 149 provides that where a complete determination of the controversy cannot be had without the presence of other parties, the court may direct them to be brought in and that where a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party. Notwithstanding these provisions, we are clearly of the opinion that the plaintiffs, in the instant case, should have a right to control their own suit. This section is purely statutory which gives a right of action in favor of the members of the family who shall be injured in person, property or means of support against any person or persons responsible for such injury and provides that such persons so responsible shall be liable "severally or jointly" for all damages sustained. The present statute is substantially a re-enactment of the Dram Shop Act of 1874 except where the words "intoxicating liquors" appear in the former act the words "alcoholic liquors" are used in the present act and under the former act it was held that a defendant was liable for damages occasioned by his gift or sale of intoxicating liquor whether the liquor so furnished caused the intoxication in whole or in part. It is a familiar law or tenet that when one has received an actionable injury at the hands of two or more wrong doers, all, however, numerous, are severally liable to him for damages for such injury and a plaintiff has a right to sue them jointly or he may bring his action separately

against each for the damages sustained. Parmelee Company v. Wheelock, 224 Ill. 194.

Counsel for appellants state that from the averments of the affidavit filed in support of their motion, it appears that James R. McCabe and Fred L. McClean sold intoxicating liquor to Crooke just before he shot and killed the wife and mother of appellees and therefore appellants feel that they, with the owners of the buildings which their taverns occupied, should be brought in as defendants and it is insisted by counsel for appellants that there cannot be a complete determination of this controversy without the presence of these additional parties and that appellants will be seriously handicapped in the trial of this cause if these additional parties are not brought into this suit as the evident purpose of the section referred to of the Civil Practice Act, together with Sections 168 and 175 thereof is to adjust the rights between joint tort-feasors on an equitable basis and prevent the plaintiffs from imposing upon the two defendants who are appellants in this proceeding.

In our opinion these four persons whom appellants desire appellees to sue are not interested in the subject matter of this suit. Under the authorities joint tort feasors may be sued jointly or severally. In Grewenig v. Am. Baking Co., 293 Ill. App. 604, this court said: "Ordinarily in tort actions against one defendant where the tort may have been committed by several, the defendant cannot plead the non-joinder of the others either in abatement or in bar, as the plaintiff has the right to sue any one or more joint tort feasors". If this is a correct enunciation of the law then it follows that the motion of appellants was properly overruled because if sustained the result would not be that a plaintiff has a right to sue any one or more joint tort feasors but that he must sue not only the ones he desires to sue but also all others whom

against each for the damage suffered. Ferraro Company v. Wheelock, 224 Ill. 194.

Counsel for appellants state that from the averments of the affidavit filed in support of their motion, it appears that James K. McCabe and Fred L. McClean said intoxicating liquor to Lucchesi just before he shot and killed the wife and mother of appellees and therefore appellants feel that they, with the owners of the buildings which their servers occupied, should be brought in as defendants and it is insisted by counsel for appellants that there cannot be a complete determination of this controversy without the presence of these additional parties and that appellants will be seriously handicapped in the trial of this cause if these additional parties are not brought into this suit as the evident purpose of the section referred to of the Civil Practice Act, together with Sections 168 and 175 thereof is to adjust the rights between joint tort-feasors on an equitable basis and prevent the plaintiffs from imposing upon the two defendants who are appellants in this proceeding.

In our opinion there four persons were wrongdoers before appellees to sue are not interested in the subject matter of this suit. Under the authorities joint tort feasors may be sued jointly or severally. In Crowning v. Mr. Mining Co., 293 Ill. App. 604, this court said: "Ordinarily in tort actions against one defendant where the tort may have been committed by several, the defendant cannot plead the non-joinder of the others either in abatement or in bar, as the plaintiff has the right to sue any one or more joint tort feasors". If this is a correct annotation of the law then it follows that the motion of appellants was properly overruled because if overruled the result would not be that a plaintiff has a right to sue any one or more joint tort feasors but that he must sue not only the one he desires to sue but also all others when

the defendant or defendants feel should also be joined with them as defendants. No authority has been cited to sustain any such proposition. We have seen fit to discuss this question because counsel for appellees have filed briefs and not raised the question whether the order appealed from is a final order or not. We are of the opinion it is not.

In order to authorize an appeal there must be a final judgment which settles the rights of the parties in respect of the subject matter of the suit and conclude the parties until that judgment or order is reversed or set aside. The People v. Curtis, 341 Ill. 628. There is no such final order or judgment found in this record. The denial of appellants' motion was final in the sense that the result of the court's ruling was that appellants had no right to require appellees to amend their pleadings and bring in other defendants but the rights of the parties hereto, in respect of the subject matter of this litigation was not settled or concluded by the ruling which the trial court made upon appellants' motion. This suit, as instituted by the plaintiffs and against the defendants whom the plaintiffs chose to sue, is now pending and undetermined in the Circuit Court of DeKalb County. The proper order for this court to make is to dismiss the appeal.

APPEAL DISMISSED.

the defendant or defendants feel should also be joined with them as defendants. No authority has been cited to sustain any such proposition. We have seen fit to dismiss this question because counsel for appellees have filed briefs and not raised the question whether the order appealed from is a final order or not. We are of the opinion it is not.

In order to authorize an appeal there must be a final judgment which settles the rights of the parties in respect of the subject matter of the suit and terminate the parties until their judgment or order is reversed or set aside. The People v. Curtis, 241 Ill. 628. There is no such final order or judgment found in this record. The denial of appellants' motion was final in the sense that the result of the court's ruling was that appellants had no right to require appellees to amend their pleadings and bring in other defendants but the rights of the parties hereto, in respect of the subject matter of this litigation was not settled or concluded by the ruling which the trial court made upon appellants' motion. This suit, as instituted by the plaintiffs and against the defendants when the plaintiffs chose to sue, is now pending and undetermined in the Circuit Court of DeKalb County. The proper order for this court to make is to dismiss the appeal.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9527

301

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 1940 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9527 AGENDA NO. 17

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D. 1940,

FRANK LANGE, ALBERT LANGE, EDWARD LANGE and MARTHA FOREMAN, Appellants, v. GEORGE EARL BRISTLE, Admr., Estate Lewis Bristle, Dec'd., Appellee.	APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY

DOVE, J.

Louisa Bristle died testate on April 21, 1920 leaving her husband Lewis Bristle and one daughter Olive Bristle her surviving. By her will dated July 22, 1919 she appointed Edwin B. Foreman and George Earl Bristle executors thereof. This will was duly admitted to probate, the executors qualified but the estate has never been closed. By the fourth clause of her will she gave, devised and bequeathed to her husband and daughter, to be equally divided between them as long as each shall live, the entire net income from all her property, real and personal, other than the household furniture and automobile which she bequeathed to her husband. At the death of either her husband or daughter, she directed that the entire income of her property should go to the survivor for and during his or her natural life. Her will further

Louisa Brisbin died testate on April 22, 1920 leaving her husband Lewis Brisbin and one daughter Olive Brisbin her surviving. By her will dated July 22, 1919 she appointed Edwin E. Torsman and George Earl Brisbin executors thereof. This will was duly admitted to probate, the executors qualified but the estate has never been closed. By the fourth clause of her will she gave, devised and bequeathed to her husband and daughter, to be equally divided between them as long as each shall live, the entire net income from all her property, real and personal, other than the household furniture and automobile which she bequeathed to her husband. At the death of either her husband or daughter, she directed that the entire income of her property should go to the survivor for and during his or her natural life. Her will further

provided that her husband, without giving any bond, should have full charge, care, custody and management of her real estate so long as her husband should live and so long as he should desire to have such care, custody and management thereof. The will further provided that her husband should keep her real estate rented, pay the taxes and insurance and directed him to make all necessary repairs and do all other matters and things that should be necessary in order that such real estate, together with the buildings, fences and equipment thereon should be maintained in good condition. That upon her husband's death or his refusal to continue to have charge and the management of the real estate that then her executor or executors should have the management thereof and should pay the taxes and insurance and keep up the buildings, fences and repairs so as to keep the real estate, together with any buildings, fences and equipment thereon in good condition. By the fifth clause of her will she nominated and appointed Frank G. Hollinshead and Theodosia Hollinshead, husband and wife, trustees and guardian for her daughter Olive M. Bristle, who was then, so the will recited, in the Watertown State Hospital. She directed these trustees to look after her daughter whenever she was incompetent to act for herself and she directed that one-half of the net income from her property should be paid over to these trustees at least annually and that they should hold, use and invest the same for the use and benefit of her said daughter Olive or when she was legally competent to handle the same, the net income was to be turned over to her. The trustees were directed to use any and all the income which came to their hands for the benefit and comfort of Olive and directed that they should do everything beneficial for her. The will then provided that if

provided that her husband, without giving any bond, should have full charge, care, custody and management of her real estate so long as her husband should live and so long as he should desire to have such care, custody and management thereof. The will further provided that her husband should keep her real estate rented, pay the taxes and insurance and direct him to make all necessary repairs and do all other matters and things that should be necessary in order that such real estate, together with the buildings, fences and equipment thereon should be maintained in good condition. That upon her husband's death or his refusal to continue to have charge and the management of the real estate that then her executor or executrix should have the management thereof and should pay the taxes and insurance and keep up the buildings, fences and repairs so as to keep the real estate, together with any buildings, fences and equipment thereon in good condition. By the fifth clause of her will she nominated and appointed Frank D. Hollingsed and Theodosia Hollingsed, husband and wife, trustees and guardian for her daughter Ella [illegible]. Shortly, the [illegible] was then, or the [illegible], in the [illegible] [illegible]. She directed these trustees to look after her daughter whenever she was incompetent to act for herself and she directed that one-half of the net income from her property should be paid over to these trustees at least annually and that they should hold, use and invest the same for the use and benefit of her said daughter Olive or when she was legally competent to handle the same, the net income was to be turned over to her. The trustees were directed to use any and all the income which came to their hands for the benefit and comfort of Olive and directed that they should do everything beneficial for her. She will then provided that if

any money came into their hands not needed for her care, support or benefit that the same should be invested in good first class interest-bearing securities and that in the event there was anything remaining in their hands at the time of the death of Olive that it should be distributed as provided by a subsequent clause in the will. By the sixth clause of the will she provided that upon the death of her husband and daughter Olive, that then in the event her daughter had any children her surviving that all her property should become the property of such child or children and by the seventh clause of said will she provided that in the event her daughter died without any child or children her surviving that then upon the death of the survivor of her said husband or daughter, her executors should convert all of her property into cash at public sale and after paying all costs and expenses in connection therewith should distribute thirty-six fiftieths of the balance to the appellants herein, nine-fiftieths to each, and of the remaining fourteen-fiftieths George Earl Bristle, one of her executors and a son of John Bristle, should receive five parts thereof, May Bristle Wilson, a daughter of John Bristle, should receive four parts thereof and the children of Lizzie Bristle Landis should receive the remaining five parts thereof.

On August 16th, 1938 Frank Lange, Albert Lange, Edward Lange, and Martha Foreman, Brothers and sister respectively of the said Louisa Bristle, deceased, filed the instant complaint in the Circuit Court of Whiteside County against George Earl Bristle, administrator of the estate of Lewis Bristle, deceased. The amended complaint set forth the foregoing facts and among other things alleged that at the time of her death Louisa Bristle was the owner of two hundred acres of productive land, which, upon

any money came into their hands not needed for her care, support or benefit that the same should be invested in good first class interest-bearing securities and that in the event there was anything remaining in their hands at the time of the death of Olive that it should be distributed as provided by a subsequent clause in the will. By the sixth clause of the will she provided that upon the death of her husband and daughter Olive, but then in the event her daughter had any children her surviving that all her property should become the property of such child or children and by the seventh clause of said will she provided that in the event her daughter died without any child or children her surviving that then upon the death of the survivor of her said husband or daughter, her executors should convert all of her property into cash at public sale and after paying all costs and expenses

of the bequeas to the appellants herein, nine-fifteths to each, and of the remaining fourteen-fifteths George Earl Priable, one of her executors and a son of John Priable, should receive five parts thereof, May Priable Wilson, a daughter of John Priable, should receive four parts thereof and the children of Lizzie Priable Landis should receive the remaining five parts thereof.

On August 24th, 1934 Frank Lewis, Albert Lewis, Edward Lewis, and Martha Forrest, brothers and sister respectively of the said Louisa Priable, deceased, filed the instant complaint in the Circuit Court of Tippecanoe County against Harry Priable, administrator of the estate of Lewis Priable, deceased. The amended complaint set forth the foregoing facts and among other things alleged that at the time of her death Louisa Priable was the owner of two hundred acres of productive land, which, upon

her death her husband, Lewis Bristle, took charge of and continued to manage and control the same until the death of Olive M. Bristle, which occurred on July 24, 1937, that during this time he collected all the rents, income and profits therefrom and appropriated the same to his own use; that Olive M. Bristle was an incompetent person at the time of the death of her mother and continued so until her death, that she left no surviving husband or child or descendants of any child, that Lewis Bristle neglected and failed to pay over to Frank G. Hollinshead and Theodosia Hollinshead, the trustees named in said will, or to anyone else for the use and benefit of Olive M. Bristle one-half of the net proceeds of said real estate but retained the same for his own use and benefit and died on March 29, 1938 without ever having made an accounting of the same to said trustees or to anyone else for the use and benefit of Olive M. Bristle; that the trustees named in said will never qualified or acted as trustees for Olive M. Bristle and never received any money whatever from Lewis Bristle; that Lewis Bristle took the management of said real estate with full knowledge that one-half of the net income therefrom was devised to his daughter Olive M. Bristle and knew that he was directed to pay over one-half of the net income from said estate to Frank G. Hollinshead and Theodosia Hollinshead as her trustees; that he never kept an accurate account of the monies received and paid out by him in the management of said real estate but appropriated all of the proceeds to his own use. That by his failure to account for the same in the manner directed by the will of the said Louisa Bristle, he, the said Lewis Bristle, became enriched by his wrongful act and is chargeable as a trustee de son tort and his estate is liable to

her death her husband, Lewis Priddle, took charge of and continued to manage and control the same until the death of Olive M. Priddle, which occurred on July 13, 1921, that date, also he collected all the rents, income and profits therefrom and appropriated the same to his own use; that Olive M. Priddle was an incompetent person at the time of the death of her mother and continued so until her death, that she left no surviving husband or child or descendants of any child; that Lewis Priddle neglected and failed to pay over to Frank G. Hollingshead and Theodosia Hollingshead, the trustees named in said will, or to anyone else for the use and benefit of Olive M. Priddle one-half of the net proceeds of said real estate but retained the same for his own use and benefit and died on March 27, 1922 without ever having made an accounting of the same to said trustees or to anyone else for the use and benefit of Olive M. Priddle; that the trustees named in said will never qualified or acted as trustees for Olive M. Priddle and never received any money whatever from Lewis Priddle; that Lewis Priddle took the management of said real estate with full knowledge that one-half of the net income therefrom was devised to his daughter Olive M. Priddle and knew that he was directed to pay over one-half of the net income from said estate to Frank G. Hollingshead and Theodosia Hollingshead as the trustees; that he never kept an accurate account of the monies received and paid out by him in the management of said real estate but appropriated all of the proceeds to his own use. That by his failure to account for the same in the manner directed by the will of the said Louisa Schaible, Sr, the said Lewis Priddle, become surcharged by his wrongful act and in chargeable as a trustee de son tort and his estate is liable to

-4-

account to the plaintiffs for their share of said net income, together with annual interest thereon. The complaint charged that the fair rental value of the lands was $2,000.00 annually and that each of the plaintiffs is entitled to receive from the estate of Lewis Bristle nine-fiftieths of one-half of the total net income derived from said lands since the death of Louisa Bristle and prayed that an accounting may be stated by the defendant as administrator of the estate of Lewis Bristle and that the interest of the plaintiffs in said fund may be declared and an order entered directing the defendant to pay, in due course of administration, to the plaintiffs such amount as may be found to be due each of them.

The defendant answered the amended complaint admitting some of the allegations thereof but denying that the fair rental value of the land was $2,000.00 annually. The answer particularly set forth what Lewis Bristle did pursuant to the will of the testatrix. Among other things the answer alleged that he paid the taxes and insurance amounting to $4,441.80, that he expended for necessary repairs and replacements $6,064.25, that he expended $1600.00 to an agent for handling the farm during the last eight years preceding his death, that during the years intervening between the death of Louisa Bristle and Lewis Bristle, the net income from the land amounted to $10,172.85 and that Lewis Bristle had expended an amount exceeding that sum; that after the death of Louisa and up to the time of the death of Olive he spent for the necessary and proper support and maintenance of Olive the sum of $11,490.00 and that in addition to this amount he furnished her a home, clothing, maintenance, medical supplies and doctor's services, for which he asked no credit. The answer set up laches upon the part of the

[illegible] to the plaintiffs for their share of said net income, together with annual interest thereon. The complaint charged that the fair rental value of the lands was $2,000.00 annually and that each of the plaintiffs is entitled to receive from the estate of Louis Trifilio nine-fifteenths or one-half of the total net income derived from said lands since the death of Louisa Trifilio and prayed that an accounting may be stated by the defendant as administrator of the estate of Louis Trifilio and that the interest of the plaintiffs in said fund may be declared and an order entered directing the defendant to pay, in due course of administration, to the plaintiffs such amount as may be found to be due each of them.

The defendant answered the amended complaint admitting some of the allegations thereof but denying that the fair rental value of the land was $2,000.00 annually. The answer particularly set forth that Louis Trifilio did pursuant to the will of the testatrix, among other things, the manner allowed that he pay the taxes and insurance amounting to $4,141.80, that he expended for necessary repairs and improvements $1,024.18, that he expended $1000.00 to [illegible] for building the farm during the last eight years preceding his death, that during the years intervening between the death of Louisa Trifilio and Louis Trifilio, the net income from the land amounted to $12,172.85 and that Louis Trifilio had expended an amount exceeding that sum; that after the death of Louisa and up to the time of the death of Olive he spent for the necessary and proper support and maintenance of Olive the sum of $11,480.00 and that in addition to this amount he furnished her a home, clothing, maintenance, medical supplies and doctor's services, for which he asked no credit. The answer set up laches upon the part of the

plaintiffs and denied that they were entitled to an accounting or to any relief whatever. After the issues were made up an order was entered referring the cause to the Master-in-Chancery, directing him to hear all the evidence offered on behalf of any of the parties upon the question of laches and as to the gross income realized by Lewis Bristle in his lifetime from the real estate involved, together with all evidence concerning any credits for operating expenses, maintenance, improvements, insurance and taxes claimed by the defendant as a credit against such gross income. The order of reference also directed the master to pass upon the propriety of the expenditures upon the farm for which credit is claimed and to report to the court such evidence, together with his conclusions thereon, stating to the court his findings as to gross receipts and proper credits and the net amount of rent from said real estate and the total amount of expenditures which he finds from the evidence were made by Lewis Bristle on behalf of Olive Bristle.

Upon the hearing before the master considerable evidence was taken and it was stipulated that the gross amount of rents received by Lewis Bristle was $27,224.00 and that the total amount expended by him for taxes was $3,931.80. From the evidence the master found that the following amounts were paid out by Lewis Bristle for operating expenses, maintenance, improvements, insurance and taxes, viz:

"1.	Taxes	$3931.80
2.	Insurance	612.72
3.	George Earl Bristle, Manager	1650.00
4.	Toilet	50.00
5.	Reshingling	130.00
6.	Pump repairs	30.00
7.	Milkhouse repairs	50.00
8.	Pipe	100.00
9.	Corn Crib repairs	40.00

plaintiffs and denied that they were entitled to an accounting or to any relief whatever. After the issues were made up an order was entered referring the cause to the Master-In-Chancery, directing him to hear all the evidence offered on behalf of any of the parties upon the question of laches and as to the gross income realized by Lewis Brisbin in his lifetime from the real estate involved, together with all evidence concerning any credits for operating expenses, maintenance, improvements, insurance and taxes claimed by the defendant as a credit against such gross income. The order of reference also directed the master to pass upon the propriety of the expenditures upon the land for which credit is claimed and to report to the court such evidence, together with his conclusions thereon, stating to the court his findings as to gross receipts and proper credits and the net amount of rent from said real estate and the total amount of expenditures which he finds from the evidence were made by Lewis Brisbin on behalf of Olive Brisbin.

Upon the hearing before the master considerable evidence was taken and it was stipulated that the gross amount of rents received by Lewis Brisbin was $27,124.00 and that the total amount expended by him for taxes was $3,991.80. From the evidence the master found that the following amounts were paid out by Lewis Brisbin for operating expenses, maintenance, improvements, insurance and taxes, viz:

1. Taxes	$3932.80
2. Insurance	618.75
3. Taxes [illegible]	[illegible]
4. Toilet	75.00
5. Painting	130.00
6. Lamp repairs	30.00
7. Kitchenette repairs	75.00
8. Pipe	130.00
9. Gate grab repairs	16.00

10.	Limestone	600.00
11.	Granary repairs	30.00
12.	Posts	20.00
13.	Wiring for electricity	190.00
14.	Hog house, new	500.00
15.	Chicken house, new	500.00
16.	Windmill, new	150.00
17.	Barn foundation and repair	260.00
18.	Painting buildings	900.00
19.	Cattle barn, new	1500.00
20.	Inside repairs to house	150.00
21.	Garage, new	250.00
22.	Miscellaneous repairs to house	150.00
23.	Shed repair	50.00
24.	Fences, repairing and new	800.00
	Total expended	12,644.52

The master further found that the above improvements, repairs, replacements and fencing have all remained upon the premises involved in this proceeding and that they are in reasonable amounts, that all of said expenditures were necessary, proper and reasonable and that defendant was entitled to credit therefor. The master further found that the following amounts, paid out by Lewis Bristle for the care, support and maintenance of Olive M. Bristle, were reasonable and proper charges against her estate, viz:

"1.	Funeral expenses	$260.00
2.	Mrs. Gilbert, wages	1537.10
3.	Mrs. Gilbert, wages	1334.25
4.	Edna May Gilbert, wages	160.00
5.	Edna May Gilbert, wages	210.00
6.	Mrs. Best, wages	935.00
7.	Davenport sanitarium	1455.00
8.	Davenport sanitarium	220.00
9.	Potthoff home	704.00
10.	Wilgus Sanitarium	293.45
11.	Estimated clothing for Olive for 17 years	1000.00
12.	Estimated medicine for Olive for said time	100.00
13.	Chiropractic treatments while living outside Sanitarium, estimated	200.00
	Total	$8,408.80 "

The master further found that the above improvements, repairs, replacements and fencing have all remained upon the premises involved in this proceeding and that they are in reasonable amounts, that all of said expenditures were necessary, proper and reasonable and that defendant was entitled to credit therefor. The master further found that the following amounts, paid out by Lewis Brizzie for the care, support and maintenance of Olive M. Brizzie, were reasonable and proper amounts, respectively and namely, viz:

1. Funeral expenses	$650.00
2. Mrs. Gilbert, wages	[illegible]
3. Mrs. Gilbert, wages	[illegible]
4. Mrs. May Gilbert, wages	[illegible]
5. Miss May Gilbert, wages	210.00
6. Mrs. Hart, wages	915.00
7. Davenport maintenance	1473.33
8. Davenport maintenance	880.00
9. Property taxes	791.00
10. Fuller maintenance	[illegible]
11. Estimated electric for Olive for 17 years	1000.00
12. Estimated medicine for Olive for past time	100.00
13. Christmas presents [illegible]	
Lifetime weekly maintenance	
[illegible]	
Total	[illegible]

The master further found that for the period of seventeen years Olive Bristle was incompetent, that her father, Lewis Bristle, furnished her clothing, necessary wearing apparel and toilet articles and that a reasonable estimate of such expenditures would be the above sum of $1,000.00 for said period; that he also furnished her with necessary medical assistance and that a reasonable estimate of such expenditures would be the above sum of $100.00 for said period.

From the foregoing findings the master made the following recapitulation, viz:

Defendant charged with one-half of the gross rents collected or		$13,612.00
Defendant entitled to the following credits, viz:		
One-half of expenses and maintenance of farm	$6,322.26	
Amount expended for the care and maintenance of Olive .	8,408.80	
Amount overpaid by Lewis Bristle		1,119.06
	$14,731.06	$14,731.06

To this report the defendant filed numerous objections complaining that the master had failed to allow him certain items of credit aggregating a considerable sum and the plaintiffs also filed numerous objections, all of which were overruled. These several objections were ordered to stand as exceptions to the Master's report and upon a hearing before the chancellor all exceptions to the master's report were overruled and the report of the master was approved and a decree rendered in accordance therewith finding that there is nothing due the plaintiffs from the defendant and dismissing the complaint at the costs of the plaintiffs. To reverse this decree this appeal has been prosecuted.

The basis further found that the period of separation from Olive Dunlap was incomplete, that her father, Lewis Dunlap, furnished her clothing, necessary washing equipment and toilet articles and that a reasonable variance of such expenditures would be the above sum of $1,800.00 for said period; that he also furnished her with necessary medical assistance and that a reasonable estimate of such expenditures would be the above sum of $200.00 for said period.

Upon the foregoing findings the master made the following conclusions, viz:

Defendant's counsel with one-half of the fees thereto collected of $1,412.00

Defendant entitled to the following credits, viz:
One-half of expenses and maintenance of Ann $1,200.00
Amount expended for the care and maintenance of Olive . . . . . $ [illegible]
Amount overpaid by Lewis Dunlap $1,712.00

To this report the defendant filed exceptions alleging that the master had failed to allow his counsel time of counsel approximating a consultation and the plaintiff's also filed numerous objections, all of which were overruled. These several objections were offered to stand as exceptions to the Master's report and upon a hearing before the chancellor all exceptions to the master's report were overruled and the report of the master was approved and a decree rendered in accordance therewith finding that there is arrears due plaintiff from the defendant and dismissing the complaint as the court of the plaintiff. To reverse this decree this appeal has been prosecuted.

Appellants contend that the evidence discloses that Lewis Bristle appropriated the entire income from this land to hiw own use, that he ignored the provisions of the will of his wife, did not recognize it as having any binding force and never tried or attempted to carry out its provisions. Appellants also insist that the evidence discloses that Lewis Bristle became incapacitated to personally manage the farm in 1929 and that his employment of George Earl Bristle to look after it for him was a usurpation of authority which under the will belonged to another and that all of the acts of Lewis Bristle after he became unable to personally look after the farm and the acts of his agent George Earl Bristle were in fact the acts of trespassers and they are liable as such and the defendant was not entitled to any credit for the amount he paid George Earl Bristle in managing the farm during this period of time. It is also insisted by counsel that the court erred in allowing the defendant any credit for building the cattle barn, rebuilding the chicken house, hog house or in making other improvements. We do not think there is any merit in any of these contentions. The evidence is that Olive Bristle was an incompetent person and had been for many years and was an inmate of the Watertown hospital, subsequently known as the East-Moline Hospital for many years. She was paroled at various times at the request of her father but always had to be returned and when she re-entered on November 15, 1929 she remained there until her death on July 24, 1937. She was the only child of Louisa and Lewis Bristle, who were financially well to do. Counsel for appellants in their argument state that Lewis Bristle, the father, spent a large sum of money on his daughter, that he was a man of wealth and left an estate of more than sixty thousand dollars, that it was commendable

Appellants contend that the evidence discloses that Lewis Mirabile appropriated the entire income from this land to his own use, that he ignored the provisions of the will of his wife, did not recognize it as having any binding force and never tried or attempted to carry out its provisions. Appellants also insist that the evidence discloses that Louis Mirabile became incapacitated to personally manage the farm in 1919 and that his employment of George Earl Mirabile to look after it for him was a manifestation of authority which under the will belonged to another and that all the acts of Louis Mirabile after he became unable to personally look after the farm and the acts of his agent George Earl Mirabile were in fact the acts of trespassers and they are liable as such and the defendant was not entitled to any credit for the amount he paid George Earl Mirabile in managing the farm during this period of time. It is also insisted by counsel that the court erred in allowing the defendant any credit for building the cattle barn, rebuilding the chicken house, hog house or in making other improvements. We do not think there is any merit in any of these contentions. The evidence in this Olive Mirabile was an incompetent personage and been for many years and was in charge of the Mater-nal hospital, subsequently known as the Bank-Mirabile Hospital for many years. She was paroled at various times at the request of her father but always had to be returned and when she re-entered on November 15, 1923 she remained there until her death on July 24, 1927. She was the only child of Louisa and Louis Mirabile, who were financially able to do. Counsel for appellants in their argument admit that Louis Mirabile, the father, spent a large sum of money on his daughter, that he was a man of wealth and left an estate of more than sixty thousand dollars, that it was commendable

of him to spend his own money for the support of his daughter but he had no right to spend any part of the one-half of the net income from this land because the will of his wife directed him to pay that sum over to Mr. and Mrs. Hollinshead as trustees. The controlling thought, as evidenced by the will of Louisa Bristle, was the care, comfort and welfare of her unfortunate daughter. She was to have the benefit of one-half the net income while her father lived and all if she survived him. The corpus of the estate was to be preserved for her child or children if she left any. Under the express provisions of the will the father of Olive was directed to take charge of the farm of the testatrix and keep the buildings, fences and equipment thereon in good condition and it was her desire that he without giving bond should manage the farm and retain one-half of the net proceeds for his own use and the remaining one-half of the net proceeds should be paid over to the trustees and guardian of their daughter for her own use and benefit. The allegation of the complaint is that Lewis Bristle appropriated all the income from the farm to his own use, that he became enriched by his wrongful acts, that he did not expend any part of the income from the farm for the use and benefit of his daughter Olive. These allegations are not sustained by the evidence. The record discloses Lewis expended more than one-half of the net income from this farm for the use and benefit of his daughter. It is true that the father expended it direct and did not pay it over to Mr. and Mrs. Hollinshead. Of this we do not believe the plaintiffs are in any position to complain from all the evidence found in this record. They knew the terms and provisions of the will of Louisa Bristle and the manner in which Louis Bristle was carrying out those provisions and they acquiesced therein.

of him to spend his own money for the support of his daughter but he had no right to spend any part of the one-half of the net income from this land because the will of his wife directed him to pay that rent over to Mr. and Mrs. Hollinshead as trustees. The controlling element, as evidenced by the will of Louisa Wisbie, was the care, comfort and welfare of her unfortunate daughter. She was to have the benefit of one-half the net income while her father did not fully fulfill his obligation. The surplus of the estate was to be preserved for her child or children if she left any. Under the express provisions of the will the father of Olive was directed to take charge of the farm of the testatrix and keep the buildings, fences and equipment thereon in good condition and it was her desire that he without charge take care of the farm and take one-half of the net proceeds for his own use and the remaining one-half of the net proceeds should be paid over to the trustees and guardian of their daughter for her own use and benefit. The allegation of the complaint is that Lewis Wisbie appropriated all the income from the farm to his own use, that he became enriched by his wrongful acts, yet he did not expend any part of the income from the farm for the use and benefit of his daughter Olive. These allegations are not controverted by the evidence. The record disclosed Lewis expended more than one-half of the net income from this farm for the use and benefit of his daughter. It is true that the father expended it direct and did not pay it over to Mr. and Mrs. Hollinshead. If this we do not believe the plaintiffs are in any position to complain from all the evidence found in this record. They knew the terms and provisions of the will of Louisa Wisbie and the manner in which Louis Wisbie was carrying out those provisions and they acquiesced tacitly.

The questions involved herein are purely questions of fact. We have read all of the evidence found in this record. It not only supports the findings of the master but his findings are the only findings that could be made consistent with the undisputed and uncontradicted testimony of the several witnesses who testified. The only conclusion that can be arrived at consistent with the evidence is that Lewis Bristle, acting in good faith, expended the sums so found by the master for the support, maintenance and care of his incompetent daughter and in maintaining and improving the farm involved in this proceeding, all in accordance with the wishes of his deceased wife Louisa Bristle as expressed in her will. In addition the evidence discloses that he expended a considerable sum of his own money for these same purposes.

The evidence is that Mr. and Mrs. Hollinshead never accepted the trust and neither they nor the plaintiffs ever made any objection to the way in which Lewis Bristle was handling the farm or caring for his daughter.

In this case the Master-in-Chancery saw and heard the witnesses testify. It was his province to determine the facts and his conclusions have been approved by the Chancellor. This court is therefore not justified in disturbing these findings unless from a review of the record we conclude the findings are against the weight of the evidence. Brainard v. Brainard, 373 Ill. 459. In our opinion the evidence supports the decree, which is in conformity with equity and justice and it will therefore be affirmed.

DECREE AFFIRMED.

The questions involved herein are purely questions of fact. We have read all of the evidence found in this record. It not only supports the findings of the Master but his findings are the only findings that could be made consistent with the undisputed and uncontradicted testimony of the several witnesses who testified. The only conclusion that can be arrived at consistent with the evidence is that Davis, Jessie, in each case, exercised the same as found by the master for the appellee, substance and care of his incompetent daughter and in maintaining and improving the farm involved in this proceeding, all in accordance with the wishes of his deceased wife, Jessie Davis, and in reliance on his child, in exchange for evidence that he would be rewarded a considerable sum of his own money for these same purposes.

The evidence is that Mr. and Mrs. Hollingshead never accepted the trust and neither they nor the plaintiffs ever made any objection to the way in which Jessie Davis managed the farm or cared for his daughter.

In this case the Master-in-Chancery saw and heard the witnesses testify. It was his province to determine the facts and his conclusions have been approved by the Chancellor. This court in chancery and judicial is always bound by the findings of the master or chancellor, unless it appears that the findings are against the weight of the record or contrary to the manifest decree of the chancellor. Maddox v. Ill. Cent. R. R. Co., 279 Ill. 139. In our opinion the evidence supports the decree, which is in conformity with equity and justice and it will therefore be affirmed.

AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

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